Supreme Court, U.S.
FILED

051555 APR 25 2006

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No. 05-

IN THE

Supreme Court of the United States

KRISHNA MAHARAJ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF FLORIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BENEDICT P. KUEHNE
Sale & Kuehne
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, FL 33131-2141
(305) 789-5989

CLIVE A. STAFFORD SMITH*
(*Counsel of Record*)
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT COULD GRANT A CERTIFICATE OF APPEALABILITY (COA) ONLY ON ONE FACTUAL ASPECT OF A *BRADY* OR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WHEN THESE ARE ISSUES THAT MUST BE CONSIDERED CUMULATIVELY?

II.

WHETHER THE LOWER COURT IGNORED BINDING PRECEDENT IN DISMISSING A *BRADY* CLAIM BECAUSE, ALTHOUGH PETITIONER WAS ACTIVELY MISLED ABOUT THE SUPPRESSED MATERIAL, HE COULD POSSIBLY HAVE FOUND IT HIMSELF?

III.

WHETHER THE LOWER COURT MAY PROPERLY DENY A *GIGLIO* CLAIM THAT IS NOT "ENTIRELY TRUE" IN THE ABSENCE OF A SHOWING THAT THE STATEMENT WAS "ENTIRELY FALSE"?

IV.

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Petitioner, Krishna Maharaj, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Eleventh Circuit:

OPINIONS BELOW

The judgment of the Eleventh Circuit Court of Appeals in *Krishna Maharaj v. Secretary, Department of Corrections*, 432 F.3d 1292 (11th Cir. 2005) (*Maharaj VI*), is attached as **Appendix A** to this Petition. The Eleventh Circuit's denial of Petitioner's application for rehearing, on January 25, 2006, is attached as **Appendix B**. Petitioner's Motion for a Certificate of Appealability is attached as **Appendix C**. The Eleventh Circuit's Denial of Petitioner's Motion for Certificate of Appealability is attached as **Appendix D**. The District Court's Order Granting Certificate of Appealability is attached as **Appendix E**. The District Court's Denial of Petitioner's Petition for Habeas Relief is attached as **Appendix F**.

STATEMENT OF JURISDICTION

The timely application for rehearing of the Eleventh Circuit's judgment was denied on January 25, 2006. Petitioner timely filed with this Court on April 25, 2006. However, on April 27, 2006, the Clerk of the Court sent a letter requesting that the petition be refiled within 60 days with the relevant District Court orders attached. Petitioner has done so here, adding Appendices E and F to this reformatted petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions.

The Fifth Amendment to the Constitution of the United States, which provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and impartial trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Eighth Amendment to the Constitution of the United States, which provides in pertinent part: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part: "[N]or shall any state deprive any person of life, liberty or property without due process of law. . . ."

STATEMENT OF THE CASE

Krishna Maharaj, the Petitioner, was indicted on November 5, 1986 on two counts of first degree murder and related offenses. (Tr. 1-5a) He was charged with the deaths of Derrick and Duane Moo Young on October 16, 1986. Petitioner was tried by a jury from October 5 to October 19, 1987. The jury rendered guilty verdicts on two counts of first degree murder, two counts of kidnapping with a firearm, and one count of unlawful possession of a firearm while engaged in a criminal offense. (Tr. 4184-4187)

The jury recommended life imprisonment for the murder of Derrick Moo Young and the death penalty for the murder of Duane Moo Young. On December 1, 1987, the court imposed the death penalty for the murder of Duane Moo Young, consecutive terms of life imprisonment for the murder of Derrick Moo Young and kidnapping, and 15 years imprisonment on the firearm count, to be served consecutively.

Before the preparation of the record on appeal, Mr. Maharaj moved to stay the appellate proceedings and for relinquishment of jurisdiction to file a writ of error *coram nobis* based on evidence newly discovered by the law firm of Shutts & Bowen. That firm was investigating the claim of Shaula Ann Nagel, née Moo Young, to the $1,000,000 life insurance policies taken out by her father and brother shortly before their deaths. Based on documents discovered in a briefcase belonging to the Moo Youngs, recovered by the police from the murder scene, this investigation revealed the involvement of the victims in illegal business transactions including narcotics trafficking and a $100,000,000 fraudulent letter of credit. This newly discovered evidence revealed that the deposition of Nagel, relied upon by the defense, had been substantially untrue. A significant amount of *Brady* material was made available to Mr. Maharaj at that time.

The Florida Supreme Court granted Mr. Maharaj's motion and relinquished jurisdiction for a period of 90 days for an evidentiary hearing on Mr. Maharaj's claims. *State v. Maharaj* (1990 Order) (*Maharaj I*). However, Mr. Maharaj, who was now indigent, was never provided with counsel. For this reason, no hearing was held.

On direct appeal, the Florida Supreme Court affirmed Mr. Maharaj's convictions and sentences. *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992) (*Maharaj II*). The United States Supreme Court denied certiorari on January 11, 1993. *Maharaj v. Florida*, 506 U.S. 1072 (1993). Justice Blackmun voted to grant certiorari.

Mr. Maharaj filed a state petition for post-conviction relief in November 1993. It was denied without a hearing by Judge Leonard Glick. The Supreme Court of Florida later determined that Judge Glick should have been disqualified; he had been a supervising prosecuting attorney on the case. The Court held there should have been a hearing on the substance of the petition. *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996) (*Maharaj III*).

In October 1997, Judge Jerald Bagley granted relief as to Petitioner's death sentence, finding that the death sentence had been illegally imposed; the trial judge had solicited the prosecution, *ex parte*, to prepare an order sentencing Petitioner to death before the judicial sentencing hearing even took place. However, the trial court refused to grant relief as to Petitioner's convictions (3.850 Tr. 6576), or his non-capital sentences.

Petitioner appealed, asking the Florida Supreme Court to vacate his convictions. On November 30, 2000, the court denied all relief. *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000) (*Maharaj IV*).

Petitioner sought to challenge his convictions in federal court, but was denied without prejudice pending a resentencing trial. This took place in 2002, and he was sentenced to life imprisonment on the remaining capital charge against him.

His remedies exhausted, Krishna Maharaj brought his Petition for a Writ of Habeas Corpus challenging his convictions and his non-capital sentences. On August 30, 2004, the District Court denied all relief. Order on Report and Recommendation, No. 02-CIV-22240 (S.D. Fl. 2004) (*Maharaj V*). **Appendix F.**

The District Court granted a COA with respect to certain claims. **Appendix E.** However, the Court did not specify whether a COA was granted or denied with respect to other issues. Petitioner filed a motion for a COA before the Court of Appeals with respect to the issues not addressed by the lower court. **Appendix C.**

The Eleventh Circuit denied the supplemental COA. **Appendix D.** After briefing, the Court denied all relief. *Maharaj v. Secretary, Department of Corrections*, 432 F.3d 1292 (11th Cir. 2005) (*Maharaj VI*). **Appendix A.** The Court refused Petitioner's invitation to revisit the denial of the COA, and consider the other issues that were intimately

linked to the appeal. *Id.* at 1303 ("He now claims that he should be permitted to present every argument contained in his original federal habeas petition."); *id.* at 1320 ("The district court's COA was limited...and we decline petitioner's invitation to consider any other[issues]"). On January 25, 2006, the Eleventh Circuit denied Petitioner's timely motion for rehearing. **Appendix B**.

STATEMENT OF FACTS

1. Introductory Facts

At trial, the prosecution argued Mr. Maharaj murdered Derrick and Duane Moo Young, two apparently indigent businessmen whose tax returns showed income of little more than $20,000 a year. The prosecution had a motive: antipathy between Petitioner and the victims. The prosecution had an "eyewitness": Neville Butler. The prosecution had fingerprints proving Petitioner had been in the room where the murders took place, Room 1215 of the Miami Dupont Plaza Hotel. A reasonable juror would wonder: who but Petitioner could have committed the crime?

But, there were many facts that the jury did not know. Alibi witnesses established that Petitioner was 40 miles away at the time of the crime. "Eyewitness" Butler failed a polygraph in several respects concerning his story. Petitioner admitted that he had been in Room 1215 earlier that morning – for a business meeting, set up by Butler, with a man named Eddie Dames, to discuss distribution of Mr. Maharaj's fledgling newspaper, the *Caribbean Times*. The room was registered in Mr. Dames's name. But, Mr. Dames never arrived and Petitioner left, at least two hours before the murders. The jury never heard these facts, as trial counsel advised Petitioner not to take the stand. The jury heard from not a single alibi witness; defense counsel called not a one.

2. The Facts Necessary to an Understanding of the Issues

Krishna Maharaj, a British citizen, was born in Trinidad on January 26th, 1939. He moved to England in 1960, and lived there until 1985. He became a very successful businessman. In 1985, he began to spend time in Florida, since he had investments in real estate in the Fort Lauderdale area. He hoped to divide his time between England and Florida after he retired.

Mr. Maharaj had once been friends with a Jamaican who had moved to the United States, Derrick Moo Young, but by 1986 they had fallen out. The State insisted that their declining relationship was accurately described in various articles published by one Eslee Carberry in a local tabloid, the *Caribbean Echo*. These detailed Mr. Maharaj's supposed frauds on the Moo Youngs and pending criminal charges in England; their publication was meant to be the motive for Mr. Maharaj's crime. *Maharaj II* at 788.

The jury did not hear that virtually every fact (including the British pending criminal charges) was known to the prosecution to be false, and that the extent of Mr. Maharaj's "revenge" was to start a rival newspaper, the *Caribbean Times*, which was committed to rise above scandal-mongering, never mentioning Carberry or the Moo Youngs.

Under the State's theory, Mr. Maharaj asked Neville Butler, a recent acquaintance, to set up a meeting with the Moo Youngs in Room 1215, whereupon Mr. Maharaj shot them in Butler's presence. Detective John Buhrmaster testified that Mr. Maharaj denied ever being in the room. This was very damaging since it was false; Mr. Maharaj's fingerprints were found in the room. Yet, the deposition of another officer shows Detective Buhrmaster had previously said Mr. Maharaj admitted to being in the room. The jury never heard this because trial counsel did not present it.

Mr. Maharaj was seen by an independent witness sitting in Room 1215 alone reading a newspaper shortly after 8 a.m., though the prosecution had evidence that the Moo Youngs

were scheduled to arrive at 12:15 p.m. Petitioner has consistently insisted that Butler arranged for him to meet Eddie Dames, a friend of Butler's from the Bahamas, about distributing the *Times* in the islands. Mr. Maharaj left before 10 a.m. because Dames did not show. Alibi witnesses placed Mr. Maharaj in Fort Lauderdale at the time the crime took place, two-plus hours later. Yet counsel advised Petitioner not to testify (based on a misapprehension of the facts) and failed to speak with most of his alibi witnesses, much less call any of them. The jury never heard this critical evidence.

The State also presented evidence from Tino Geddes, who initially confirmed Mr. Maharaj's alibi, but who testified at trial to outlandish stories about Mr. Maharaj buying camouflage uniforms for a ground assault on the Moo Young home. His stories were pure fantasies and provably so – but counsel had not deposed Geddes, and was not prepared to impeach him.

Even as the State's star witness, Butler's story at trial was flimsy. He supposedly arranged for Mr. Maharaj to meet with the unsuspecting Moo Youngs in Dames' room. Dames allegedly knew nothing about the planned crime, and was off shopping with an associate from the Bahamas, Prince Ellis, at the time of the murder. Ellis has now recanted testimony he gave for the State, admitting Dames was involved in drugs and in the crime, and that Mr. Maharaj was framed. The jury never heard this -- and the state court refused to consider it.

As the "eyewitness," Butler testified that Mr. Maharaj shot the Moo Youngs using only one glove, *à la* Michael Jackson. Butler said that the two of them then sat in a car at a meter outside the hotel for three hours watching the police, waiting for Eddie Dames [Godot?], because Mr. Maharaj supposedly wanted to verify that Dames actually existed. Again, this was wholly inconsistent with Butler's previous statement to police that Mr. Maharaj and Dames had met in the lobby earlier.

The State's case hinged almost entirely on Butler's testimony. If Butler was credible, then Mr. Maharaj was guilty; if not, Mr. Maharaj was acquitted. To ensure victory, the State suppressed critical impeachment evidence, and even lied to the judge (and the Florida Supreme Court), saying that Butler had passed a polygraph test. In truth, he had failed it in significant parts. Mr. Maharaj had meanwhile passed a test asserting his innocence.

The State's case never made any sense, even in 1987. It defies belief that Mr. Maharaj planned to commit a murder in the Dupont Plaza Hotel, where he was well known, arriving over four hours early, using a gun that was not silenced, in a room registered to a man he did not know, who could come in at any moment.

The key to this conviction lies in the State's suppression of an unparalleled amount of *Brady* material. The State had material in its files demonstrating that far from Mr. Maharaj being the only person with an axe to grind with the Moo Youngs, as the State claimed, there were others with a far stronger motive to kill. This included evidence, incredibly, that the Moo Youngs were involved in laundering money around the Caribbean to the tune of *$5 billion*, and were negotiating to buy a bank from Manuel Noriega's Panama for *$600 million*. The Moo Youngs were skimming one percent off the top of the money they were laundering – an enormous amount of money, and a weighty reason to fear for their lives at the hands of the cartels. Eddie Dames turned out to be a drug dealer with links to F. Nigel Bowe, an attorney who in 1985 had been charged with a large drug trafficking scheme involving the Medellin Cartel. Bowe's Bahamian law office was the registered address of the Moo Youngs' front corporation, *Cargil International (Bahamas)*. Bowe had links with Adam Amer Hosein, a Trinidadian who had passed himself off as the then-wealthy Krishna Maharaj at horse races, and who – according to a suppressed telephone message – had called Room 1215 the morning of the crime.

The only other room occupied that day on the twelfth floor of the hotel was rented to a Colombian whom evidence now suggests is linked to cartels.

Hosein, who supposedly had no links to the victims, was actually an officer in another Moo Young corporation, *Amer Enterprises*, that bore his middle name. Prince Ellis, the man supposedly shopping with Eddie Dames when the murders took place, now admits that Dames was not an upstanding citizen, but rather was a drug dealer in the Bahamas. This, and a plethora of other suppressed evidence, points inexorably to the extraordinary truth: Petitioner was set up by drug dealers who had a very powerful motive to want the Moo Youngs dead.

Normally, cases seeking a writ of certiorari focus on technical issues that – while very significant – often bear little relationship to the most important issue of all: whether the individual is actually guilty of the crime for which the State sought his death. This is not the case here. We now know that the State's theory at trial was false, and relied heavily for its success on defense counsel's failure to prepare, and the State's suppression of extremely favorable evidence. Kris Maharaj is an innocent man who has struggled for almost 20 years to clear his name. This Court should grant certiorari to remedy some of the improper legal rulings that have allowed such a miscarriage of justice to persist for so long.

REASONS FOR GRANTING THE WRIT

Questions I, II and III focus primarily on the State's suppression of favorable evidence, providing a coherent opportunity for this Court to resolve various issues that have split and confused the lower courts. The erroneous treatment of these issues explains why the Eleventh Circuit reached the wrong conclusion in this case.

Questions IV and V involve important issues implicated in Petitioner's case where this Court has already granted

certiorari review in other cases – whether there is a constitutional claim of innocence, and the proper treatment of a violation of the Vienna Convention on Consular Relations. That the Eleventh Circuit could deny a Certificate of Appealability on the innocence issue, when at least four reasonable jurists on this Court have already found the issue to have arguable merit, reflects the unacceptable manner in which this case was considered in the lower court.

I. Whether the Lower Court Could Grant a Certificate of Appealability (COA) Only on One Factual Aspect of a *Brady* or Ineffective Assistance of Counsel Claim, When These Are Issues That Must Be Considered Cumulatively?

It is well established that *Brady*[1] and ineffective assistance of counsel issues[2] should both be assessed cumulatively.[3] However, the lower courts have struggled to develop a rule regarding the grant or denial of a COA on these issues. With respect to both, the lower court here adopted a policy of "divide and conquer," granting a COA only on a limited portion of each claim. This is logically and legally inappropriate.

a. Since a *Brady* Issue Must Be Considered Cumulatively, the Lower Court Could Not Legitimately Refuse a COA on a Large Proportion of the Suppressed Evidence, and then Assess the "Cumulative Impact" of the Error Without Reference to the Material Excluded from the COA.

The lower court recognized that a *Brady* violation must be viewed cumulatively – in other words, that all of the suppressed evidence must be viewed in aggregate in

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1 *Brady v. Maryland*, 373 U.S. 83 (1963).

2 *Strickland v. Washington*, 466 U.S. 668 (1984).

3 *Kyles v. Whitley*, 514 U.S. 419, 436, 441 (1995); *Strickland*, 466 U.S. at 694.

assessing whether the trial was fair. However, the court denied a COA with respect to much of the claim, and therefore ultimately did not consider it in aggregate.

i. The Factual Background of the Issue in this Case

The lower court held as follows in Petitioner's case:

> A constant theme found throughout Maharaj's appeal is that the district court erred in so far as it considered the various *Brady* violations individually, and not acting in concert. In *Kyles*, the Supreme Court made clear that a *Brady* materiality determination must consider the aggregate effect of all the suppressed evidence. *Kyles*, 514 U.S. at 436, 441, 115 S.Ct. at 1567, 1569. That does not mean, however, that an individual assessment of each piece of suppressed evidence is somehow inappropriate. Indeed, the only way to evaluate the cumulative effect is to first examine each piece standing alone.

Maharaj VI, 432 F.3d at 1309-10.

There is no problem considering each aspect of the claim independently, so long as the court also considers the aggregate impact of all the suppressed material. This, the Court failed to do. If a District Court grants a COA on part of a *Brady* claim, it makes no sense to deny a COA on other elements of the same claim.

Three elements of Petitioner's *Brady* claim were addressed by the Eleventh Circuit. These were the evidence that star prosecution witness Neville Butler's testimony had been coerced through the use of a polygraph,[4] the contents of

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[4] *See generally* Question III, *infra*. The lead prosecutor did not simply omit to say that Mr. Butler had problems with his polygraph, but rather stated: "Mr. Butler took a polygraph and passed." (Tr. 4435-36) (emphasis supplied). Even as late as the appeal to the Supreme Court of Florida, the State was blatantly misstating the facts. Brief of Appellee (Supplemental Argument) at 1 (Sept. 19, 1990) ("Butler first decided to tell the truth and the polygraph was given to

the Moo Youngs' briefcase discovered at the murder scene,[5] and the million dollar life insurance policies the Moo Youngs took out in August 1986.

The *Brady* material that was not included in the analysis is compelling, and arguably sufficient to compel relief alone:

- evidence of Adam Hosein's involvement in the murders, *Maharaj V* at 22-23;
- notes made by the police concerning Petitioner's invocation of his rights, *id.* at 23;[6]
- a memo containing highly critical information concerning Eslee Carberry, publisher of the articles

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determine if his second statement was the truth. At no time did Butler fail a polygraph and then tell the truth.").

[5] The Eleventh Circuit applied the wrong standard with respect to this element of the claim. "In describing why the briefcase documents were not material, the state post-conviction trial court observed that the documents would not have impeached star witness Neville Butler, nor refuted testimonial evidence taken from hotel employees, the fingerprint evidence tying Maharaj to the hotel room, or the ballistics evidence regarding Maharaj's gun." *Maharaj VI*, 432 F.3d at 1315. Petitioner notes that actually the state court observed only that the material would not have impeached Butler. Regardless, that is not the issue. *Brady* material can make the defense presentation materially stronger, or make the prosecution case materially weaker. Contrary to the Eleventh Circuit's ruling, a reasonable doubt may arise out of either.

[6] Detective Buhrmaster's failure to acknowledge (or apparent plan to lie about) the fact that Petitioner asserted his right to a lawyer reflected on Buhrmaster's bias, in addition to supporting issues involving suppression. (3.850 Clerk Tr. 2021) (Police notes state: "Buhrmaster and Amato go to jail at 12:18am with Maharaj. (D invokes his right to attorney.) *FORGET THIS.*"). Likewise damning is the fact that Buhrmaster wrote notes that he should admit truths "only if Eric [Hendon, defense counsel] ask[s] about this," *Maharaj V*, at 24 n.20. It takes little imagination to see how a defense lawyer could shake a witness's credibility by showing that he has written a "script" of what he should and should not say before the jury.

that supposedly provided Petitioner with motive to kill, *id.* at 24;[7]

- the plethora of evidence about the *Caribbean Echo* articles and the false information they contained regarding supposed pending criminal charges against Mr. Maharaj in England (discussed only in the context of ineffectiveness, *Maharaj V*, at 33-34, whereas there is plentiful evidence of suppression);
- the other persons with guns that could have been used in the crime, *id.* at 24; and
- the fact that the gun that the prosecution argued was the murder weapon had been taken from Appellant by the police long before the crime. *Id.* at 25.[8]

The COA should have been granted on all the *Brady* issues. It simply makes no logical sense for the District

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[7] With respect to the Carberry memo, again the issue is not only "the surley [sic – sullied?] reputation of both Carberry and the newspaper he ran," *Maharaj V*, at 24, but also the bias with which the police acted in failing to follow up about a significant prosecution witness. *See Kyles v. Whitley*, 514 U.S. at 446 ("the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation"), citing *Lindsey v. King*, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (impeachment evidence might have had effect of the "discrediting, to some degree, of the police methods employed in assembling the case against him"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir.), *cert. denied*, 479 U.S. 962 (1986) ("The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation").

[8] It is difficult for Petitioner to comprehend how the District Court could find that this issue was "fully presented before the jury for its consideration," *Maharaj V*, at 25, when the critical evidence for the defense – the notes in the police file and the testimony of an independent witness – was not presented to the jury to refute the false testimony of law enforcement.

Court to limit the COA to three aspects of the *Brady* violation, yet purport to make a cumulative assessment of potential prejudice.

ii. This Issue Has Divided the Lower Courts

This question involves a COA, not the substance of the *Brady* claim. Obviously, at this late date in the evolution of *Brady*, every court recognizes that the examination must be cumulative. However, the courts are divided on whether the cumulative nature of the claim mandates that a COA be granted on the entire issue.

The Fourth Circuit has disagreed with the Eleventh Circuit's approach. *See, e.g., Hedrick v. True*, 443 F.3d 342, 348, 352 (4th Cir. 2006) (granting a COA on the entirety of petitioner's IAC and *Brady* claims; finding "evidence ... does not add up to a reasonable probability that Hedrick's sentence would have been different").

The Fifth Circuit also disagrees with the Eleventh Circuit. In *Graves v. Dretke*, 442 F.3d 334, 339 n.3 (5th Cir. 2006), the Fifth Circuit granted a COA and remanded for "an evidentiary hearing and a decision on the merits of [Graves's] *Brady* claims," using the plural as if a *Brady* claim were not to be considered in its totality. However, in ultimately considering the evidence that had been suppressed and granting relief, the Fifth Circuit looked at the various claims in their totality, noting that the "issue under Graves' *Brady* claim is whether, *considered together*, the two [suppressed] statements . . . are material." *Id.* at 343. *See also Sosa v. Dretke*, 133 Fed. Appx. 114, 121-23 (5th Cir. 2005) (unpublished) (considering all seven aspects of the *Brady* claim cumulatively in denying COA).

b. Likewise, Given That a Claim of Ineffective Assistance of Counsel Looks to the Aggregate Impact of Counsel's Lapses Over An Entire Phase of the Trial, the Lower Court Cannot Assess the

"Cumulative Impact" of the Error With Reference To Only One Aspect of the Claim.

If the proper treatment of the *Brady* issue has caused confusion in the lower courts, the parallel treatment of an ineffective assistance of counsel (IAC) issue has provoked far more disagreement, perhaps because an IAC claim is likely to arise more often. Just like *Brady*, an IAC claim cannot be decided by isolating one aspect of the claim, and ignoring the rest. However, the Eleventh Circuit made the same mistake regarding IAC as it did regarding *Brady*.

i. The Factual Background to the Issue

In Petitioner's case, there is a very strong claim that he was denied the right to testify on his own behalf because his lawyer mistakenly thought that Mr. Maharaj would be exposed on cross-examination to questioning about a homicide charge in England – a fear that was entirely a figment of counsel's befuddled imagination:

> At the time trial counsel advised Petitioner [not to testify], he was under the impression that Maharaj had two outstanding warrants in Great Britain, both of which were allegedly mentioned in newspaper articles. It now appears that the warrants had been resolved at the time trial counsel provided his advice. Maharaj says that trial counsel was ineffective in failing to discover that the warrants had been resolved and that he would have testified had he been provided with competent advice.

Maharaj VI, 432 F.3d at 1318.[9]

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[9] As Petitioner has repeatedly emphasized, the Eleventh Circuit's analysis even of this part of the ineffectiveness claim is flawed. Not only did counsel misapprehend the status of the warrants (which, it is clear from evidence *suppressed* by the prosecution, had been resolved) but, more importantly, counsel totally misunderstood what the warrants were for. Somehow, he had it in his mind that Petitioner was wanted for *murder*. As he gave his advice, counsel thought these charges involved "a very large fraud scheme or scam," and the

However, this was only one element of counsel's inadequacies. The habeas petition contains well over one hundred pages of ineffectiveness issues. *Id.* at 102-25, 135-36, 138-45, 148-55, 156-78, 186-242. None of this is mentioned in the "aggregate" assessment of counsel's performance. *Cf. Terry Williams v. Taylor*, 529 U.S. 362 (2000) (the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the *totality of the available mitigation evidence* – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation") (emphasis supplied).

Again, the issue concerns the grant of a COA: can the lower court logically grant a COA on "part" of an IAC claim?

ii. This Issue Has Also Divided the Lower Courts

The Eleventh Circuit simply refused to consider the IAC issue as one claim, but divided to conquer, by granting a COA only on part of the IAC claim, and then considering each facet of the claim separately.[10] This extremely narrow

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"[]other one was . . . *possible homicide related charges*." (3.850 Tr. 453-54) (emphasis supplied). In truth, the original warrants involved the failure to pay taxes on a shipment of bananas, and the alleged purchase of a silver teapot that was supposedly stolen property. Even these allegations were false, and had been resolved. There never was a homicide-related charge in England.

[10] It is worth noting that the Eleventh Circuit has taken its (Petitioner contends, inappropriate) analysis one step further in *Peoples v. Campbell*, 377 F.3d 1208 (11th Cir. 2004), where two different lawyers represented Mr. Peoples prior to and during his trial. While the court properly granted a COA on all the allegations of IAC, *id.* at 1223, the court then considered the nineteen separate allegations of IAC against trial counsel William Short together, *id.* at 1236 n.57, but considered the four allegations of IAC against Ray Robbins, who represented Mr. Peoples during his initial detention, as a distinct issue, *id.* at 1237-38, and found two of them to be procedurally barred, *id.* at 1239, and two of them to be without merit. *Id.* at 1241. Whether it is appropriate to discount the procedurally barred

reading of Supreme Court law cannot be justified either in law or in logic.

Other circuits have struggled in structuring similar inquiries and have reached differing conclusions. While the Fifth Circuit has not been a model of clarity, the court has discussed the issue of ineffectiveness in terms of the aggregate of "counsel's errors": "In our analysis we do not attempt to place the events of trial into two separate airtight containers of the first and second prongs of Strickland. The facts that demonstrate a reasonable probability of a different outcome but for counsel's decisions can cast light on their reasonableness." *Draughton v. Dretke*, 427 F.3d 286, 293 (5th Cir. 2005); *see also id.* at 296-97 (discussing the "factually interrelated question of prejudice"); *see also Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003) (considering and denying COA on IAC claim as a whole); *Smith v. Dretke*, 422 F.3d 269, 276-84 (5th Cir. 2005) (considering all aspects of penalty IAC claim in granting a COA on that issue); *but see Mathis v. Dretke*, 124 Fed. Appx. 865, 878-82 (5th Cir. 2005) (unpublished) (denying COA on IAC claim in capital case; analyzing each alleged deficiency separately, without ever considering them in aggregate).[11]

The Sixth Circuit examines the totality of an ineffectiveness claim. For example, in *Clark v. Mitchell*, 425 F.3d 270 (6th Cir. 2005), the court noted with approval that "[t]he district court in granting the COA recognized that these issues [of ineffectiveness] are interrelated." *Id.* at 280 n.2. *See also Dailey v. Savage*, 34 Fed. Appx. 247 (6th Cir. 2001) (unpublished) (district court granted COA on full scope of IAC claim).

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allegations of ineffectiveness is one matter (*see infra*), but it cannot be correct to consider the allegations concerning one lawyer separately from the other.

[11] The case is unpublished, but as this Court noted on April 17, 2006, in allowing citation to unpublished opinions, the case, and those cited *infra*, provide useful insight and should therefore be considered.

The Tenth Circuit joins the Sixth Circuit, and has reached a holding that is directly contrary to the Eleventh Circuit rule. *Mathews v. McKune*, 133 Fed. Appx. 512, 515 (10th Cir. 2005) (unpublished) (considering an application for a COA on IAC grounds involving a series of claims; state court was correct in "assessing the overall merit of the ineffective-assistance-of-counsel claims, [and holding] that Applicant's trial counsel was not deficient"); *Parker v. Scott*, 394 F.3d 1302, 1323 (10th Cir. 2005) (considering a series of allegations and concluding that "none of counsel's acts, either alone or cumulatively, rise to the level necessary to justify granting the habeas petition").[12]

In *Sweet v. Delo*, 125 F.3d 1144 (8th Cir. 1997), the Eighth Circuit adopted the broader rule, granting a COA on all of the elements of the IAC claim. *Id.* at 1148. However, the court then parsed the record to determine which elements of the same IAC claim had been defaulted by the state court, and which had not, *id.* at 1149-52, thereby actually considering only a very limited part of the IAC claim in the aggregate conclusion. *Id.* at 1153-54.

The Third Circuit follows the majority rule, and grants full review of the entire IAC claim. *See, e.g., Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001) (considering entirety of culpability and penalty phase IAC claims). However, the court again distinguishes between elements of the IAC claim in different procedural postures. For example, in *Henderson v. DiGiulielmo*, 138 Fed. Appx. 463 (3d Cir. 2005)

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[12] It is worth noting that the approach taken by the Tenth Circuit in *Parker* is a variation on the theme, dealing with certain elements of the IAC claim in different *procedural* contexts. *Parker v. Scott*, 394 F.3d at 1307 ("He also raises several other claims relating to the conduct of counsel or the admission of testimony or evidence at trial that he did not raise in the district court. We conclude those claims are waived."); *see also Hood v. State of Wisconsin*, 107 F.3d 873, 1997 WL 58830, at **1 (7th Cir. 1997) (unpublished) (declining to consider elements of an IAC claim raised for the first time on appeal).

(unpublished), the court dealt with an ineffectiveness claim comprised of two distinct issues: the failure to call particular witnesses, and failure to deal with juror misconduct. The court properly granted a COA on both issues, but considered each in its procedural setting. The first issue was timely, but ultimately meritless. *See id.* at 470. The second issue was untimely brought, and therefore barred from review. *Id.* at 467. Thus, the court did not aggregate them when considering the IAC claim. *See also Connor v. Espinda*, 82 Fed. Appx. 525, 526 (9th Cir. 2003) (unpublished) (dispensing with any discussion of the breadth of a COA, and dismissing the IAC claim "when viewed as a whole").

The courts have taken various approaches. Petitioner's case presents an ideal vehicle for resolving this conflict.

II. Whether the Lower Court Ignored Binding Precedent in Dismissing a *Brady* Claim Because, Although Petitioner Was Actively Misled About the Suppressed Material, He Could Possibly Have Found It Himself?

The Eleventh Circuit had to go to great lengths to dismiss Petitioner's *Brady* claim about the victims' briefcase, since the suppressed evidence within the briefcase changed the whole complexion of the case. At trial, Derrick Moo Young was portrayed as an unfortunate, disabled businessman, lucky to pull down $24,000 in a year. In truth, the evidence within the briefcase ultimately indicated that in 1986, he and his son were traveling frequently to and staying at posh hotels in Europe, the Cayman Islands, Mexico, Panama, Puerto Rico, Trinidad and throughout the United States, laundering billions of dollars of drug money around the Caribbean, and negotiating a deal worth hundreds of millions of dollars to buy a bank in Panama. However, Mr. Maharaj did not learn of the briefcase contents until well after the trial.

Before the trial, Petitioner's investigator asked Detective Buhrmaster about the briefcase, which appeared in crime

scene photos. The Detective told him the briefcase and its contents had been returned to the Moo Young family, clearly implying that the briefcase contained nothing of evidentiary value. Yet, the Eleventh Circuit found no *Brady* violation.

To achieve its inequitable result, the Eleventh Circuit had to reinterpret this Court's precedent, requiring the defense to prove that it could not have found exculpatory evidence on its own, where the prosecution has suppressed evidence:

> Our case law is clear that "[w]here defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government." *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983); *accord LeCroy*, 421 F.3d at 1268 (noting that there was no *Brady* violation because the defendant could have obtained the information had he used "reasonable diligence"); *Haliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1239 (11th Cir. 2003); *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988); *United States v. Cortez*, 757 F.2d 1204, 1208 (11th Cir. 1985). The evidence was not suppressed by the state.

Maharaj VI, 432 F.3d at 1315.

This is very a strained interpretation of the standard imposed by this Court. Indeed, Petitioner had strenuously argued this Court's precedent, *Banks v. Dretke*, 540 U.S. 668 (2004), and the Eleventh Circuit felt compelled to seek to distinguish *Banks* in a footnote:

> Nor is this case at all like the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), where the Court cautioned that "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696, 124 S.Ct. at 1275. In *Banks*, the

> prosecutors failed to disclose that a key witness was a paid police informant, and stood by as that witness affirmatively testified to the contrary. The Court rejected the State's argument that the defendant could have more diligently pursued the police officer involved, and in doing so might have discovered the witness' [sic] status. The Court summarized the State's argument as one where "'the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence.'" *Id.* (citing the oral argument transcript) (alteration in original). In contrast, in this case, the prosecution did not physically possess the documents Petitioner sought, and it made no false or misleading statements regarding what that evidence might show or where it might be found. Indeed, the police unambiguously directed the investigator to where he might obtain the evidence. When the defendant has "equal access" to the evidence disclosure is not required.

Id. at 1315 n.4.

This is incorrect indeed. To say that the defense in a murder case has equal access to the victims' family does not square with reality. In any event, the defense had no idea what was in the briefcase, and merely asked Detective Buhrmaster about it as part of its general investigation. Unbeknownst to trial counsel, after telling the defense investigator that the briefcase was with Moo Young family, Buhrmaster then retrieved the briefcase and held it in police custody until it was discovered in post-conviction proceedings. Only then did the defense learn, for the first time, about the treasure trove of material held inside it.

By distinguishing *Banks* (and the long history of precedent that *Banks* followed), the Eleventh Circuit adds to yet another significant conflict among the lower courts. The "standard" applied by the Eleventh Circuit was that there is no prosecution "suppression" of evidence where the defense

has information within its knowledge that could have led to the material, or where the defense could have found it with "due diligence."

The Eleventh Circuit has imposed an equally onerous burden on the defense in other cases, holding, for example, that the prosecution is not under an obligation to turn over a witness's criminal history, as the defense could go out and locate it themselves. *See United States v. Cook*, 2006 WL 622576, at *2 (11th Cir. 2006) (unpublished) (finding that, although the prosecution failed to turn it over, "information about the witness's criminal history and probationary status was publicly available"). This directly conflicts with other courts. *See Belmontes v. Brown*, 414 F.3d 1094, 1113 (9th Cir. 2005) (prosecution "has an obligation to disclose 'all information bearing on that witness's credibility,' including 'the witness's criminal record'") (citation omitted).

The Sixth Circuit has set a similar standard, requiring that the defense seek out exculpatory material. *See, e.g., Puertas v. Overton*, 168 Fed. Appx. 689 (6th Cir. 2006) (unpublished) (holding defense could have learned of police corruption investigation from newspaper article, although there was no showing defense counsel saw it). The Sixth Circuit requires that a *Brady* claim be rejected where the petitioner "has made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part." *Id.* at 695, quoting *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000).

Notably, *Puertas* was decided over a dissent, where Judge Moore took the majority to task for ignoring *Strickler v. Greene*, 527 U.S. 263, 284-85 (1999). In *Strickler*, this Court found "that 'a letter published in a local newspaper' containing statements from a witness that made it clear that she had been interviewed several times by a particular detective was insufficient to alert the defendant to the existence and suppression of records relating to those interviews." *Puertas*, at 705 (Moore, J., dissenting). The

prosecution's burden is to turn over favorable evidence, not to wait to see whether the defense lawyer reads the right newspaper and follows up on the lead.

The Fifth Circuit has likewise rejected the rule applied by the Sixth and Eleventh Circuits. *See Mathis v. Dretke*, 124 Fed. Appx. 865, 877 (5th Cir. 2005) (unpublished) ("we find unpersuasive the State's argument that they had no duty to disclose exculpatory evidence [a prior competency evaluation of the accused] that was available in the public record."). The Fifth Circuit has adopted a standard whereby, before the prosecution can defend a discovery violation on grounds of equal access, there must be a showing that "information is *fully available* to a defendant at the time of trial...." *Id.* at 876, quoting *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); *see also Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial"); *cf. Titsworth v. Dretke*, 401 F.3d 301, 307 (5th Cir. 2005) ("The principle that there is no duty to produce evidence equally available to the prosecution and defense is sound but is pushed too far on these facts. The prosecutors had been ordered to produce information favorable to the defense and assured counsel that they had done so.").

The Ninth Circuit has joined the Fifth Circuit against the Sixth and Eleventh. *See Gantt v. Roe*, 389 F.3d 908, 913 (9th Cir. 2003) ("While the defense lawyer could have been more diligent . . . this does not absolve the prosecution of its *Brady* responsibilities."); *Atkins v. County of Riverside*, 151 Fed. Appx. 501, 504 n.2 (9th Cir. 2005) ("We also reject [the] argument that mere access on the part of the defendant to the allegedly fabricated police report absolved the government of any *Brady* duty of disclosure.").

Thus, once again the lower courts are in disarray in terms of the appropriate standard to be applied to a *Brady* issue. This Court should resolve the conflict.

III. Whether The Lower Court May Properly Deny a *Giglio* Claim By Holding That Evidence That Is Not "Entirely True" Is Not "Entirely False"?

There is a third, closely related issue involved in the suppression of favorable evidence. With respect to the *Giglio*[13] claim that the primary witness against Petitioner gave false testimony, the state court's "partial-pregnancy" approach to perjury was ratified by the federal courts: "While the statement concerning an act of conscience [being the impetus for Nevill Butler's changing his story] may not be entirely true, there has been no showing that it was entirely false. . . ." *Maharaj VI*, 432 F.3d at 1312-13; *see also Maharaj V*, at 27, quoting *Maharaj IV*, 778 So. 2d at 957.

This standard makes little sense. A witness does not swear to tell "mostly the truth, most of the truth, and mostly nothing but the truth." A particular statement cannot, logically, be "true" if it is partially false. If it is not true, then it is false.

Clearly, the testimony here was false. The issue is why Butler changed his testimony from the story told to the grand jury and in his first deposition, to the story he told at trial. At trial, the prosecution allowed Butler to repeat (at least seven times) his tale about coming forward voluntarily to change his testimony when his conscience pricked him:

- "I voluntarily agreed to correct the wrongs I had – statements I had made when *I approached the . . . State Attorney* and told him about it." (Tr. 3052) (emphasis added)
- "Subsequently, as I recalled things and I am sure you have my deposition, that I kept saying from time to time if I remember things, I will bring it up and when *I did get in touch with the State Attorney* to let him know of the lies I had told or the things that I was covering up to protect myself." (Tr. 3061)

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[13] *Giglio v. United States*, 405 U.S. 150 (1972).

- "Again, *I did, on my own, get in touch with the State Attorney to correct all the things that I said that was incorrect.* Regardless of what the consequences were, I was prepared to abide by it because I felt I was wrong. I did a few things that were wrong and having come to the State Attorney and told him that I was wrong, I was prepared to abide by whatever the consequences." (Tr. 3069)
- *"[A]s I told the State Attorney, as I remember things, I would bring it to his attention.* This is what happened." (Tr. 3096)
- "[A]fter realizing and coming to my senses, is when I *got in touch with the State Attorney* and explained what I had done and prepared to stand the consequences." (Tr. 3097)
- Butler said that his conscience pricked him in March, so *he went to the State* and told them the truth. (Tr. 3098)
- Butler testified that although he did not remember things during his January 13th-14th deposition, he later did remember some of the details and he *then went to the State* with that new information. (Tr. 3161)

Indeed, the prosecution did not just let these lies go uncorrected, but it actively compounded them. At Butler's second deposition, lead prosecutor Paul Ridge told defense counsel that "Mr. Butler has *come forward* and said the whole purpose of the meeting [at the Dupont Plaza Hotel] was not what he told you in prior statement or prior deposition. . . ." (Tr. 834) (emphasis supplied).[14]

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[14] This is not the whole scope of the *Brady* violation here. Astonishingly, Detective Buhrmaster got together with the prosecutors to prepare for his testimony, so that he could explain (falsely) the reasons for Butler's change of heart. A note in

This was perjury, pure and simple. The reality is that Butler was summoned in for a polygraph test. He took the test and was found to be deceptive. He was then taken out to the metaphorical woodshed, and told in no uncertain terms to change his story. He did so, and was tested again, and was *still determined to be deceptive*. All of this was withheld from the defense.[15]

The District Court accepted the fact that Butler lied, since he did not voluntarily "come forward" and change his story. *Maharaj V*, at 27 ("It appears likely from the testimony that he, in fact, changed his testimony because he was confronted with either the request to take a polygraph or with the results of the polygraph.").[16] If this "seems likely," then Petitioner

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Buhrmaster's file reflects his preparation for his own cross-examination, should the point arise:

CROSS EXAM:

1. "Nevell [Butler']s [*sic*] change" – He never has changed his story about how it happened, he just changed on 02 Mar 87, that he did in fact set up this meeting and what Maharaj was going to do there (exception he committed the murder)
2. He was afraid that he was also involvement [*sic*] in the murder.
3. It's still unknown what status of N. Butler & what will happen to him pending arrest. (3.850 Clerk Tr. 2027)

[15] The Eleventh Circuit mischaracterizes the results of the polygraph testing. Butler did not fail just one question (number ten). *Maharaj VI*, 432 F.3d at 1310-11. He was given two polygraphs, including a second one after he had been coerced into changing some of his testimony, and he failed two additional questions on the second. (3.850 Clerk Tr. 154) Petitioner does not mean to accept the probity of polygraphs – Butler was lying about the entire story – but the fact that the prosecution believed that its star witness was lying should surely have been revealed to the defense.

[16] To be more precise, Butler did not change his testimony because of the *results* of the polygraph, as he did not change the main lie on which he failed the test – he stuck to the story that he and Mr. Maharaj remained outside the Dupont Plaza waiting for Eddie Dames for three hours after the murder. He changed his testimony because he was browbeaten by the prosecutors.

has carried his burden of proof by a preponderance of the evidence.[17]

Prosecutor Paul Ridge conceded at the post-conviction hearing that Butler changed his story "either because of being confronted with the results of the polygraph examination, or my persuasive argument for him to tell us the truth." (3.850 Tr. 519) In other words, Butler repeatedly lied to the jury.

So when is a "partial lie" the truth, the whole truth, and nothing but the truth? As the Eleventh Circuit has itself stated, "no Supreme Court case since *Giglio* itself has squarely addressed a *Giglio* claim." *Ventura v. Attorney General*, 419 F.3d 1269, 1279 (11th Cir. 2005). Not surprisingly, the lower courts have become confused as to the proper standard to be applied.

We begin with the Eleventh Circuit's novel rule – that the defense bears a burden of proving more than the witness' falsity, but his *total falsity*, whatever that purports to mean. The Sixth Circuit has adopted a somewhat similar, equally troubling standard. In *Abdus-Samad v. Bell*, 420 F.3d 614 (6th Cir. 2005), the court held that to meet the prohibition of *Giglio*, "[t]he statement must be 'indisputably false' rather then 'merely misleading.'" *Id.* at 626, quoting *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000); *but cf. Carter v . Mitchell*, 443 F.3d 517, 536 (6th Cir. 2006) ("the *Giglio* issue specifically, that is, whether the prosecutor deliberately

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[17] The State and the lower courts have come up with various imaginative explanations for why Butler may have said that his change of testimony was "voluntary." *Maharaj IV*, 432 F.3d at 1313 ("The State opined Butler may have considered his change of testimony voluntary because he voluntarily appeared for further questioning."). Yet, whatever the definition of the word "voluntary" (apparently as chimerical as the word "is" during the Clinton Administration), we know that Butler was asked to come in to meet with the prosecutors to take a polygraph and to discuss his testimony – he did not have a case of conscience and call up to ask for a meeting.

allowed misleading testimony to go uncorrected") (emphasis added in part).

The Fifth Circuit, on the other hand, has recognized that *Giglio* is designed to protect the jury from false conclusions. The Court has held that "a due process violation does not require the evidence actually to be false where 'the context in which the testimony was invoked, and the argument made by the prosecutor ... [created] implications that were false.'" *United States v. Schlieve*, 159 Fed. Appx. 538, 546 n.28 (5th Cir. 2005) (unpublished), quoting *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000).

Likewise, the Ninth Circuit does not require a showing that the testimony was totally false. In *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005), a divided *en banc* court found a *Giglio* violation. However, the court was unanimous that a *Giglio* violation could be established where the evidence was known by the prosecution to be false, even though the witness believed he was testifying truthfully. In *Hayes*, the witness did not know about the deal that his lawyer had struck with the prosecution, so when he denied knowing of any deals, his testimony was not false. *Id.* at 980-81; *see also id.* at 990 (dissenting opinion) ("To label the testimony of James 'false' is a misnomer on these facts"). The court roundly rejected "the argument that the presentation of false testimony, carefully orchestrated to avoid perjury, does not offend the Constitution...." *Id.* at 981.

Thus, Question III presents another thread in the *Brady-Giglio* theme distorted by the Eleventh Circuit below. This Court should grant certiorari on all three questions and provide comprehensive guidance to the lower courts.

IV. Whether The Lower Court Properly Denied a COA In Ruling That No Reasonable Jurist Could Conclude That a Showing of Factual Innocence, Standing Alone, May Compel the Vacation of a

Conviction When This Court Had Already Granted Certiorari On That Issue?

Petitioner is innocent of the charges in this case. Petitioner has consistently claimed that the Federal Constitution should not countenance the conviction of the innocent, no matter whether technical errors taint the conviction. However, in the procedural context of this case, the question is not whether as a matter of substantive constitutional law "innocence is irrelevant." Rather, in the procedural context of a COA, "[a]t this stage, . . . we only ask whether the District Court's application of [law] . . . was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Importantly, this Court went on to note: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338, 1040.

Here, the conclusion should have been rather obvious. On June 28, 2005, this Court granted certiorari in *House v. Bell*, No. 04-8990. One of the questions presented raised precisely this issue: "What constitutes a 'truly persuasive showing of actual innocence' pursuant to Herrera v. Collins sufficient to warrant freestanding habeas relief?" At least four "reasonable jurists" on this Court believed the issue was worthy of further consideration almost six months before the Eleventh Circuit decision. *Maharaj VI*, 432 F.3d at 1303 & n.1, 1320. The Eleventh Circuit's denial of a COA on the issue was simply untenable. This Court should summarily reverse, ordering that a COA be issued. Alternatively, this Court should hold the case pending the *House* decision, and remand when the lower court will have more guidance.

V. Whether Petitioner's Vienna Convention Claim Was Improperly Dismissed on Procedural Grounds?

Much of the Eleventh Circuit opinion was focused on the Vienna Convention issue. *Maharaj VI*, 432 F.3d at 1303-08, 1319-20. Mr. Maharaj was not advised of his consular rights – indeed, he never has been officially advised to this very day. The Eleventh Circuit held that the issue was procedurally barred, based on this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998).

This Court granted certiorari in two cases to address just this question. *Sanchez-Llamas v. Oregon*, No. 04-10566; *Bustillo v. Johnson*, No. 05-51. Those cases have been argued and will be decided shortly. Mr. Maharaj respectfully suggests that his case should either be reversed outright or be remanded in light of the ultimate decision in those cases.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of certiorari.

Respectfully submitted,

CLIVE A. STAFFORD SMITH
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

BENEDICT P. KUEHNE
Sale & Kuehne
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, Fla. 33131-2154
(305) 789-5989

Counsel for Petitioner

June 2, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-14669

KRISHNA MAHARAJ,
Petitioner-Appellant,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
JAMES V. CROSBY, ATTORNEY GENERAL OF FLORIDA,
CHARLIE CRIST,
Respondents-Appellees.

Dec. 15, 2005
Rehearing Denied Jan. 25, 2006

Appeal from the United States District Court
for the Southern District of Florida

Before HULL, MARCUS and HILL, *Circuit Judges.*

MARCUS, *Circuit Judge:*

Krishna Maharaj appeals from the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 claiming that the state prosecutor's office improperly withheld *Brady* material, that he received ineffective assistance of counsel, and that he was denied his rights under the Vienna Convention on Consular Relations. The Florida Supreme Court denied Maharaj's application for post-conviction relief in all respects.

After thorough review, we affirm. The Florida Supreme Court's disposition of Maharaj's claims was neither contrary

to nor an unreasonable application of clearly established federal law; nor was its decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

I.

The basic facts and procedural history are straightforward. A state-court jury in Miami-Dade County, Florida found Maharaj guilty of two counts of first degree murder, two counts of kidnaping, and one count of unlawful possession of a firearm while engaged in a criminal offense, for the shooting deaths of Duane and Derrick Moo Young. Maharaj was sentenced to die for one of the murder counts, to life imprisonment without the possibility for parole for twenty-five years for the second murder count, to two life sentences for the kidnaping counts, and to fifteen years' imprisonment for the firearm count. His convictions and sentences were upheld by the Florida Supreme Court on direct appeal. *Maharaj v. State*, 597 So.2d 786 (Fla.1992) ("*Maharaj I*"). His subsequent request for post-conviction relief was denied by the state trial court, which was, in turn, reversed by the Florida Supreme Court for failing to hold an evidentiary hearing and for failing to recuse in light of an ethical conflict. *Maharaj v. State*, 684 So.2d 726 (Fla.1996) ("*Maharaj II*"). On remand, the trial court denied Maharaj's post-conviction application for relief as to his conviction,but granted his request to vacate the death sentence. *Maharaj v. State*, 778 So.2d 944 (Fla.2000) ("*Maharaj III*"). A new penalty trial was ordered, after which Maharaj was sentenced to life imprisonment on the murder count for which he had previously been sentenced to die.

The facts giving rise to Maharaj's convictions, taken from the three opinions of the Florida Supreme Court and from the testimony presented at his trial, are these. Krishna Maharaj is a British national, born in Trinidad, who was living in South Florida in October of 1986. He owned and operated a newspaper, the *Caribbean Times*, that catered to the West Indian

Community. In the spring of 1986, Maharaj approached Eslee Carberry, the owner of another South Florida community newspaper, the *Caribbean Echo*, and told Carberry that Derrick Moo Young had stolen money from him. He gave Carberry documents that purported to corroborate his accusations about Derrick Moo Young, and paid the *Caribbean Echo* a $400 "sponsorship fee" to publish an article detailing the alleged theft.

After the article appeared in the *Caribbean Echo*, Derrick Moo Young contacted Carberry to provide his side of the story. Carberry testified that he met with Derrick Moo Young twice, and that Moo Young provided documents detailing a lawsuit he had filed against Maharaj. Subsequently, the *Caribbean Echo* published a series of articles describing Maharaj's alleged involvement in an illegal scam to take millions of dollars out of Trinidad.

The state's most important trial witness was Neville Butler, a reporter for the *Caribbean Echo*. Butler testified that in the course of writing for the *Caribbean Echo*, he had occasion to meet Derrick Moo Young and had assisted in writing some of the articles critical of Maharaj. At some point in September of 1986, Butler contacted the *Caribbean Times* after hearing from a friend that Maharaj might be interested in having Butler write for his paper too. He met with both Maharaj and Maharaj's wife, and although he was never officially hired, he wrote several articles for the *Caribbean Times* under various pen names.

Butler testified that shortly after he became associated with Maharaj and his periodical, Maharaj told him that Carberry and Moo Young were trying to extort money from Maharaj's relatives in Trinidad in exchange for suppressing still other stories critical of Maharaj and his family. Maharaj also told him that Carberry and Moo Young suggested to people in Trinidad that Butler was really behind the extortionate attempts. Butler said that Maharaj asked him to set up a meeting

with Derrick Moo Young, so that Maharaj could: (1) extract a confession from Moo Young that he was actually behind the extortion and bribery; (2) require Moo Young to write two checks to repay him for the fraud; and (3) cause Butler to go to a bank with the checks and certify them, at which time Maharaj would permit Moo Young to leave.

Maharaj made it clear to Butler that Moo Young would not knowingly agree to a meeting with Maharaj. Accordingly, in order to trick Moo Young into meeting with Maharaj, a plan was devised whereby Butler would tell Moo Young, who was engaged in importing and exporting goods, that two individuals from the Bahamas (Eddie Dames and Prince Ellis) would be in Miami and that they were interested in purchasing goods for their catering business. Butler arranged for the meeting to be held on October 16, 1986, in Dames' room at the Dupont Plaza Hotel in Miami. He never informed Moo Young that Maharaj would be at the meeting.

Maharaj and Butler met at the Dupont on the morning of October 16. Butler gave Dames the keys to his rental car and instructed Dames that he would meet Dames in the lobby at around noon or 1:00 p.m.-which would allow sufficient time to use Dames' room for the 11:00 a.m. meeting with Moo Young. When Derrick Moo Young arrived at the Dupont Plaza Hotel for the meeting, Butler was surprised to see that Moo Young had unexpectedly brought along his son, twenty-three-year-old Duane Moo Young.

As the Moo Youngs entered Dupont Plaza Hotel room 1215, Maharaj emerged from behind the door carrying a pillow in his left hand and a gun in his gloved right hand. Soon thereafter, an argument ensued, and Maharaj shot Derrick Moo Young in the leg. Maharaj then instructed Butler to tie up Duane and Derrick Moo Young. Before he could do so, Derrick Moo Young lunged at Maharaj, who again shot Derrick Moo Young, hitting him three or four more times. Maharaj then turned his attention to Duane Moo Young, who Butler had

loosely tied to a chair with the cord from an immersion heater. While Maharaj was talking to Duane Moo Young, Derrick Moo Young managed to open the door to the hallway and attempted to crawl outside. Once he noticed the escape attempt, Maharaj shot Derrick Moo Young still again and dragged him back inside the room by his ankles.

Butler testified that Maharaj then went back to interrogating Duane Moo Young, attempting to verify what the Moo Youngs had done with the money allegedly extorted from Maharaj's relatives in Trinidad. Soon thereafter, a person identifying himself as a hotel security guard shouted from outside the room that he noticed blood in the hall and inquired whether everyone was all right. According to Butler, Maharaj moved towards the door and responded that everything was all right. After several minutes of silence, Maharaj opened the door, poked his head out into the hall and appeared to tell someone that everything was all right. After Maharaj re-entered the room, Duane Moo Young unsuccessfully lunged at Maharaj in an attempt to gain control of the gun. Maharaj continued to interrogate Duane Moo Young, this time on the top floor of the two-level hotel suite.

Butler, who remained on the lower floor, testified that he then heard a single shot from above, after which Maharaj came downstairs alone, and they both left the room. Maharaj and Butler took the elevator to the ground floor and retrieved Maharaj's car from the parking lot. They drove around the block. Butler voiced his opinion that they needed to wait at the hotel for Dames to return. Maharaj agreed, and they parked in front of the hotel for approximately three hours until Dames returned.

While parked in front of the hotel, Maharaj told Butler that he was just as guilty for what happened in the room as Maharaj was, because Butler had arranged the meeting and been present during the killings. Maharaj promised Butler that he would take care of him, stating that he would give Butler a job with

the *Caribbean Times,* provide a down payment for Butler's house, and give him a car.

When Dames finally arrived at the Dupont, Butler exited the car, retrieved his car keys from Dames, and left the scene. Later that day, Maharaj contacted Butler and told him he wanted to meet at a Denny's restaurant near the Miami Airport so they could coordinate their stories. Butler subsequently met up with Dames and Ellis, who had given statements to police investigators. Dames and Ellis convinced Butler to contact the police. Butler then called the lead investigator on the case, Miami Police Detective John Buhrmaster, and explained what had happened in the hotel room. Butler brought Buhrmaster to the Denny's, where Maharaj was arrested.

The State presented other witnesses at trial who testified as to motive and prior acts by Maharaj that were consistent with the murders at the Dupont Plaza Hotel. For example, Tino Geddes, a journalist at the *Caribbean Echo,* testified that Maharaj had purchased camouflage clothing and exotic weapons and had twice attempted to ambush Eslee Carberry. Furthermore, Geddes said that on one occasion, Maharaj met him at the Dupont Plaza Hotel, with a handgun, and asked Geddes to call Derrick Moo Young and Eslee Carberry and lure them to the hotel. Although Geddes called both, neither came.

The State also presented corroborating testimonial and physical evidence. Loretta Molaskey, a maid at the Dupont Plaza Hotel, testified that she thoroughly cleaned the room where the murders occurred (suite 1215) on the morning of October 16, 1986, and that it appeared as if nobody had slept in the room the night before. She said that at around 12:15 p.m., her boss summoned her to room 1215 where he saw blood on the hallway carpet outside the door. While there, she noticed that the room was double-locked from the inside, preventing her from opening it with the master key, and that there was no "Do Not Disturb" sign on the exterior of the door. Some five

to ten minutes later, Molaskey was contacted by hotel security and again asked to return to room 1215. She did, discovering that the door was no longer double-locked and there was a "Do Not Disturb" sign hanging on the exterior doorknob. At the request of the security guard, she opened the door with the master key and discovered the bodies of Derrick and Duane Moo Young.

Other hotel employees testified similarly. Miguel Sueiras, Ms. Molaskey's boss, testified that when he summoned Molaskey to open the door to room 1215, there was blood on the outside carpet, the door was double-locked, and there was no "Do Not Disturb" sign hanging on the doorknob. Jorge Aparicio, a security guard at the Dupont, testified that he too noticed blood outside room 1215, and when he asked whether everyone inside was all right, someone inside answered that everything was fine. He also noticed that there was no "Do Not Disturb" sign on the door at that time.

The State also presented a fingerprint expert who testified that Maharaj's fingerprints were found in approximately twelve places in room 1215, including on the "Do Not Disturb" sign that was found on the exterior doorknob when the room was opened, on the exterior portion of the entrance door, on the interior bathroom door and doorframe, on the top of the bureau, on a soda can found on the bureau, on the telephone and television, on the bottom of a glass tabletop, on a piece of paper left in an ashtray, on two newspapers, and on the torn plastic packages for the immersion cords.

A firearms expert testified that, based on multiple projectiles and fragments recovered from the hotel room and Derrick Moo Young's body, eight bullets were fired from a Smith & Wesson model 39, nine-millimeter semiautomatic pistol with a serial number less than 270000. Richard Bellrose, a city of Miramar police officer, testified that he sold a Smith & Wesson model 39 pistol, serial number A235464, to his supervising lieutenant in 1986, who in turn sold the gun to

Krishna Maharaj. Gregory Jansen, a City of Plantation police officer, testified that Krishna Maharaj was stopped for a traffic infraction on July 26, 1986, some three months before the murders, and that he found a Smith & Wesson model 39, nine-millimeter handgun, bearing serial number A235464, in the trunk of Maharaj's car. Finally, Sylvia Ramos, a crime scene technician with the City of Miami Police Department, testified that Derrick Moo Young had black gunpowder on the upper-right shoulder area of his shirt, a finding consistent with having been shot at very close range.

As noted, the state-court jury found Petitioner guilty on all counts. After his convictions were affirmed and he was denied state post-conviction relief on the guilt phase of his case, Maharaj petitioned for federal habeas relief. The application was referred to a federal magistrate judge, who recommended denying relief on all counts. Petitioner objected to the Report and Recommendation, and the district judge conducted a *de novo* review of the entire petition. In a lengthy and comprehensive order, the district judge denied relief as to each of Petitioner's claims. Petitioner filed a timely appeal and the case is now properly before us.

II.

Maharaj commenced his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and, therefore, the provisions of that Act govern this appeal. *Wade v. Battle*, 379 F.3d 1254, 1259 (11th Cir.2004). Under AEDPA, Petitioner was required to obtain a Certificate of Appealability ("COA") before he could appeal the district court's decision. *See* 28 U.S.C. § 2253(c)(1)(A). A COA must be specific in detailing the issues appropriate for appeal, and "appellate review is limited to the issues specified in the COA." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir.1998).

In the initial order denying habeas relief, the district court listed five issues as being worthy of appeal: 1) whether the State prejudicially suppressed discoverable *Brady* material by not disclosing the report of Neville Butler's polygraph examination; 2) whether the State prejudicially suppressed discoverable *Brady* material by not allowing access to or disclosing the contents of the victims' briefcase; 3) whether the State prejudicially suppressed discoverable *Brady* material by not disclosing any knowledge of or information in its control regarding the victims' life insurance policies; 4) whether Petitioner's trial counsel was constitutionally ineffective for not investigating allegations of pending charges and outstanding warrants against Petitioner in England before advising his client not to testify during the guilt phase of his trial; and 5) whether, in light of recent opinions of the International Court of Justice ("I.C.J."), a federal court has jurisdiction to determine, on the merits, whether the State violated Petitioner's right to consular notification despite the Florida Supreme Court's finding that Maharaj had procedurally defaulted this claim by failing to raise it on direct appeal. The district court subsequently entered an amended COA, adding a sixth issue: whether Maharaj was prejudiced by the alleged *Brady* violations, when considered individually or in concert.

Maharaj moved for a COA, which we viewed as a request to expand the scope of the district court's COA. We denied that request. He now claims that he should be permitted to present every argument contained in his original federal habeas petition. We deny this request and limit our review to the six issues outlined in the district court's COA. *See Murray*, 145 F.3d at 1251.[1]

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[1] The claims in his petition can generally be grouped this way: 1) denial of adequate resources to present his state collateral attack; 2) failure of the state courts to consider the aggregate effect of his claims; 3) numerous alleged *Brady* violations; 4) numerous allegations of ineffective assistance of counsel; 5) denial of the right to testify in his own defense; 6) numerous

III.

After his appeal was filed in this Court, indeed after briefing was complete and an oral argument date had been scheduled, Petitioner asked us to stay consideration of the case pending resolution of a motion he filed in state court on September 2, 2005. The state court motion seeks post-conviction relief on the ground that Maharaj's rights under the Vienna Convention were violated when the arresting officers failed to inform him that he could contact the British consulate. Although the claim was previously presented in the state post-conviction proceedings, it was never considered on the merits because Maharaj failed to raise it on direct appeal. *See Maharaj III,* 778 So.2d at 959 (holding that because Maharaj did not raise the Vienna Convention claim on direct appeal, Florida law procedurally barred him from doing so in post-conviction proceedings).

Rarely are we asked to stay appellate proceedings in deference to concurrent state litigation. However, in providing guidance to the district courts, where this situation arises more frequently, we have looked to the Supreme Court's decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *See Moorer v. Demopolis Waterworks & Sewer Bd.*, 374 F.3d 994, 997 (11th Cir.2004) (noting that "[t]he *Colorado River* doctrine of exceptional circumstances authorizes a federal district court to dismiss or stay an action when there is ongoing parallel action in state court") (internal quotation marks and citation omitted); *see also Currie v. Group Ins. Comm'n*, 290 F.3d 1, 9-13 (1st Cir.2002) (analyzing the *Colorado River* factors in deciding whether it should stay a case currently on appeal in deference to concurrent state litigation). In *Colorado*

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allegations of prosecutorial and judicial misconduct; 7) new evidence suggesting actual innocence; 8) numerous alleged *Giglio* violations; 9) perjured testimony at the grand jury proceedings; and 10) violations of international law.

River, the Supreme Court cautioned that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" and that a federal case should be dismissed in deference to a state proceeding in only the most "exceptional" of circumstances. 424 U.S. at 817-18, 96 S.Ct. at 1246.

We have applied the following factors in considering whether to stay or dismiss a case because of concurrent state litigation:

> (1) the order in which the courts assumed jurisdiction over property; (2) the relative inconvenience of the fora; (3) the order in which jurisdiction was obtained and the relative progress of the two actions; (4) the desire to avoid piecemeal litigation; (5) whether federal law provides the rule of decision; and (6) whether the state court will adequately protect the rights of all parties.

TranSouth Fin. Corp. v. Bell, 149 F.3d 1292, 1294-95 (11th Cir.1998) (summarizing the factors set forth by the Supreme Court in *Colorado River* and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). The decision of whether to stay a case, however, does not rest on a mechanical checklist, and the weight of each factor will vary from case to case. *Moorer*, 374 F.3d at 997 (noting that "[o]ne factor alone can be the sole motivating reason for the abstention").

Maharaj relies on three points in explaining why a stay would be appropriate here: 1) the I.C.J.'s opinion in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31); 2) a memorandum from President Bush to the Attorney General on February 28, 2005; and 3) the Supreme Court's recent order in *Medellin v. Dretke*, --- U.S. ----, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005). Petitioner suggests that he was never informed of his right to contact the British consulate after his arrest, in violation of the Vienna Convention, and that the state courts should have

considered the *merits* of his claim, irrespective of the procedural bar. That is the argument he makes in his newly filed state-court motion and the same one he now contends should cause us to stay these proceedings. Application of the standards generally used in determining the wisdom of a stay yields the conclusion that we should go forward with Maharaj's appeal now.

To begin with, both the United States and the United Kingdom are parties to the Vienna Convention on Consular Relations. Article 36 of the Vienna Convention provides that upon arrest, a foreign national has the right to contact the consular post of his home country, and that the arresting authorities must inform the detainee of that right. Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, T.I.A.S. No. 6820. Once a detainee is informed of his right to contact the local consulate's office, the arresting authorities must forward any desired communications to that foreign office. *Id.*[2]

The Optional Protocol to the Vienna Convention further provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes, art. I, April 18, 1961, 21 U.S.T. 326, T.I.A.S. No. 6820 ("the Optional Protocol"). In March of 2004, the I.C.J. issued an

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[2] The Convention specifically provides that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, T.I.A.S. No. 6820.

opinion in a case brought by Mexico against the United States on behalf of fifty-two Mexican nationals arrested in this country who alleged that their rights of notification and contact had been denied them by various domestic law enforcement authorities. *See Case Concerning Avena And Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31). In *Avena*, the I.C.J. held that an arresting authority *must* notify a foreign national of his rights regarding contact with the local consulate once the detaining officials realize the person is a foreign national, or once there are grounds to believe the person is probably a foreign national. *Avena*, 2004 I.C.J. 12, at 43. The I.C.J. found that those rights had been violated as to some of the named *Avena* plaintiffs, and the court ordered the United States to permit "review and reconsideration" of the relevant cases by United States courts, "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant." *Id.* at 59-60. The I.C.J. also determined that the application of state procedural default rules prevented full effect from being given to those rights accorded under Article 36, and, therefore, that the application of procedural default rules violates Article 36. *Id.* at 57.

Following the I.C.J.'s decision in *Avena*, President Bush issued a memorandum to the Attorney General in which he ordered that the United States discharge its international obligations under the *Avena* decision by "having State courts give effect to the decision in accordance with general principles of comity in cases filed by the *51 Mexican nationals* addressed in that decision." *Medellin*, 125 S.Ct. at 2090 (citing the February 28, 2005 memorandum from President George W. Bush to the Attorney General) (emphasis added). Shortly thereafter, however, the Secretary of State transmitted a letter to the Secretary General of the United Nations withdrawing the United States from the Optional Protocol, *see Medellin*, 125 S.Ct. at 2101 (O'Connor, J., dissenting), thereby removing the

United States from the provision of the Vienna Convention that provides jurisdiction to the I.C.J.

Thereafter, in the *Medellin* case, the Supreme Court granted certiorari to consider whether a federal court is bound by the holding of the I.C.J. in *Avena*, and whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the I.C.J.'s judgment. *Medellin*, 125 S.Ct. at 2089. Medellin, the petitioner in that case, was one of the fifty-two named *Avena* plaintiffs. The Court noted that Medellin had filed a successive state application for a writ of habeas corpus while his case was pending before the Supreme Court, and that this application "may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ required, and that Medellin now seeks in [the federal proceeding]." *Id.* at 2090. Additionally, the Court observed that there were five basic procedural issues it would have to address before it could reach the merits, including: 1) whether a violation of the Vienna Convention was one of those "nonconstitutional lapses" cognizable in a federal post-conviction proceeding; 2) whether the state court's judgment could be considered contrary to, or an unreasonable application of clearly established federal law; 3) whether or how the decision announced in *Avena* bears on the normal requirement that a habeas petitioner cannot enforce a "new rule of law" pursuant to *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); 4) whether a violation of the Vienna Convention could be considered a denial of a constitutional right for the purposes of a COA; and 5) whether the claims based on *Avena* and the President's memorandum were exhausted in state court. *Medellin*, 125 S.Ct. at 2090-92 (internal quotation marks omitted). Because of the possibility that the State of Texas might provide Medellin with the relief he was seeking, the Court thought it "unwise to reach and resolve the multiple hindrances to dispositive answers" lurking in Medellin's case. *Id.* at 2092. Accordingly, it dismissed certiorari as having been improvidently granted. *Id.*

With this background we apply the *Colorado River* factors to this case. Neither of the first two considerations is particularly helpful here, because there is no real property at issue, and neither forum appears substantially more or less convenient than the other. The third factor, which looks to the order in which jurisdiction was obtained and the relative progress of the two actions, weighs in favor of denying the stay. Maharaj waited until September 2, 2005, to file his motion in state court, well after briefing had been completed in this case and, indeed, less than six weeks before oral argument was scheduled in the appellate court. We can discern no apparent reason for the delay. *Avena* was decided in early 2004, the President's memorandum issued in February of this year, and the Supreme Court dismissed certiorari in *Medellin* on May 23, 2005. Although under the facts of this dispute the relative timing of the two cases is a lesser consideration, this factor weighs in favor of denying the stay request.

The fourth factor, the desire to avoid piecemeal litigation, weighs far more heavily in favor of denying the request for a stay. Quite simply, we are not convinced that there is even a reasonable probability that the state court action will be resolved in such a way as to "moot" any of the issues currently before us. *See Jefferson County v. Acker*, 210 F.3d 1317, 1318 n. 1 (11th Cir.2000) (noting that the court had denied a stay of appellate proceedings because there did not appear to be a reasonable probability that any of the federal issues would be rendered moot by the state proceedings); *Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1524-25 (11th Cir.1984) (reversing the district court's decision to enter a stay pending the resolution of state court litigation because the state action "probably will not resolve the issues pending in the federal litigation"); *see also Currie*, 290 F.3d at 11. The only way the proceedings before us could be resolved or rendered moot would be if the state court found that Maharaj is entitled to relief on the merits of his Vienna Convention claim *and* vacated his prior conviction-thereby completely obviating

the need for us to consider his current appeal. There is no reasonable probability that will happen.

First, Florida's state courts are bound (just as we are) by the Supreme Court's decision in *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). In *Breard*, the Court unambiguously held that a habeas petitioner's Vienna Convention claim was procedurally barred in federal court because it was not raised in the state court proceedings. *Id.* at 375, 118 S.Ct. at 1354. The Court noted the well-recognized principle of international law that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of [a] treaty in that State." *Id.* The Supreme Court has not retreated from its position in *Breard*, and none of the recent developments cited to us call the holding of *Breard* into substantial question, let alone overrule *Breard*. Thus, there is no reasonable probability that Florida's state courts could find themselves free of the constraints of *Breard*, regardless of the I.C.J.'s holding in *Avena*.

Second, even if Florida's courts somehow found a way to consider the Vienna Convention claim in spite of the procedural default, it seems to us that claim would likely fail on the merits anyway. The Florida Supreme Court has already definitively held that an individual does not have standing to raise a claim under the Vienna Convention, which constitutes an "agreement[ ] between countries, not citizens." *Gordon v. State*, 863 So.2d 1215, 1221 (Fla.2003); *Maharaj III*, 778 So.2d at 959.

Although our case law is not binding upon a Florida state court, our precedent similarly supports the idea that the Vienna Convention does not confer judicially enforceable *individual rights*. In *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir.2002), we found that a criminal defendant could not seek to have an indictment dismissed based on an alleged violation of Article 36 of the Vienna Convention. *Id.* at 1281. As support, we cited to the preamble of the Convention itself, which

"disclaims any intent to create individual rights, stating that its purpose 'is not to benefit individuals but to ensure the efficient performance of functions by consular posts.'" *Id.* at 1281-82 (quoting the Preamble to the Vienna Convention). We also noted several extra-textual sources, including the State Department's view "that the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law," and the fact that no party to the Vienna Convention had ever dismissed an indictment based on a violation of Article 36. *Id.* at 1282. Although our holding in *Duarte-Acero* was limited to the remedy sought in that case, which was dismissal of the indictment, the sources we used to support that holding seemingly prohibit *any* individual remedy. The Preamble is clear; the Convention is not intended to benefit individuals. The State Department's interpretation of the treaty, which is entitled to our respect, *see El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999), is also unambiguous; the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.

Because of the Supreme Court's clear holding in *Breard* that violations of the Vienna Convention are subject to procedural default rules and the decisions of the Florida Supreme Court that Article 36 does not confer judicially enforceable individual rights, we remain unpersuaded that there is a reasonable probability Maharaj will prevail in the parallel state litigation. We are keenly aware of the comity due state court proceedings and the resources wasted when two courts unnecessarily proceed along the same track and at the same time. Those powerful considerations, however, are not apparent in this habeas petition, and the chances of conflicting results or wasted resources are improbably small. The fourth factor weighs heavily in favor of denying Petitioner's request for a stay.

We are also aware that the Supreme Court has recently granted certiorari in two cases that raise issues under the

Vienna Convention. *See Sanchez-Llamas v. Oregon,* --- U.S. ----, 126 S.Ct. 620, 163 L.Ed.2d 503 (2005); *Bustillo v. Johnson,* --- U.S. ----, 126 S.Ct. 621, 163 L.Ed.2d 503 (2005). That the Court has granted certiorari in cases that may provide the vehicle by which it *could* overrule *Breard* does not change our conclusion. For even if *Breard* were overruled, Maharaj would still be a long way from the relief he seeks. Before our case could be rendered moot, the Florida courts would first have to determine that the Supreme Court's potential ruling applied to cases on collateral review, then that the Vienna Convention provides an individual with a remedy (the treaty mentions none), and finally that the specific remedy necessary to nullify our case (a new trial) is available and appropriate under these facts. There is no reasonable probability Maharaj will successfully navigate around each of these substantial hurdles.

The fifth factor-whether federal law provides the rule of decision-does not weigh heavily in either direction, since the questions presented involve both state and federal law. Finally, the sixth factor, which asks whether the state court will adequately protect the rights of all parties, is similarly unavailing under the facts of this case.

Accordingly, we decline the invitation to stay our hand in favor of the recently filed state proceeding. This case was originally tried some seventeen years ago in 1987, making the time for finality long overdue. We proceed to the merits of this habeas petition.

IV.

When examining a district court's denial of a § 2254 habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error. *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1259 (11th Cir.2005). However, in reviewing the decisions of the Florida Supreme Court, we are governed by the terms of

AEDPA, which provides, among others, that we may grant a writ of habeas corpus *only* if (1) the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) the state decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The district court concluded that Maharaj failed to meet this exacting standard. We agree.

The phrase "clearly established Federal law," as used in § 2254(d)(1), encompasses only the holdings of the Supreme Court of the United States. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000) (holding that the language of § 2254(d)(1) expressly "restricts the source of clearly established law to [the Supreme Court's] jurisprudence"). As we have previously explained,

> § 2254(d)(1) provides a measuring stick for federal habeas courts reviewing state court decisions. That measuring stick is "clearly established Federal law." 28 U.S.C. § 2254(d). Clearly established federal law is *not* the case law of the lower federal courts, including this Court. Instead, in the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. at 1523.

Putman v. Head, 268 F.3d 1223, 1241 (11th Cir.2001) (footnote omitted).

Moreover, section 2254(d)(1) provides two separate bases for reviewing state court decisions; the "contrary to" and "unreasonable application" clauses articulate independent considerations a federal court must consider. *See Williams*, 529 U.S. at 404-05, 120 S.Ct. at 1519; *Henderson v. Campbell*, 353 F.3d 880, 890 n. 15 (11th Cir.2003), *cert. denied*, 543 U.S.

811, 125 S.Ct. 44, 160 L.Ed.2d 14 (2004). A state court decision is contrary to clearly established federal law if either "(1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." *Putman*, 268 F.3d at 1241. An "unreasonable application" of clearly established federal law may occur if the state court "identifies the correct legal rule from Supreme Court case law but unreasonably applies this rule to the facts of the petitioner's case." *Id.* "An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Id.*

Section 2254(d)(2) provides an additional basis upon which a federal court may grant a writ of habeas corpus to a state prisoner: when the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A state court's determination of the facts, however, is entitled to substantial deference. 28 U.S.C. § 2254(e)(1) (noting that "a determination of a factual issue made by a State court shall be presumed to be correct" and that an "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). With these principles in mind, we review the merits of Petitioner's *Brady* claims, his ineffective assistance of counsel claim, and his Vienna Convention claim.

V.

First, Maharaj suggests that state prosecutors violated *Brady* by failing to disclose: 1) the results of Neville Butler's polygraph examination; 2) the contents of the Moo Youngs' briefcase; and 3) the Moo Youngs' life insurance policies.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court enunciated the now well-established principle that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The duty to disclose exculpatory evidence is applicable even in the absence of a request by the defendant, and it encompasses impeachment material as well as exculpatory evidence. *See Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). Moreover, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (internal quotation marks and citations omitted). The Supreme Court has condensed these basic principles into three components, each of which is necessary to establish a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948.

A constant theme found throughout Maharaj's appeal is that the district court erred in so far as it considered the various *Brady* violations individually, and not acting in concert. In *Kyles*, the Supreme Court made clear that a *Brady* materiality determination must consider the aggregate effect of all the suppressed evidence. *Kyles*, 514 U.S. at 436, 441, 115 S.Ct. at 1567, 1569. That does not mean, however, that an individual assessment of each piece of suppressed evidence is somehow inappropriate. Indeed, the only way to evaluate the cumulative effect is to first examine each piece standing alone. *See id.* at 436 n. 10, 115 S.Ct. at 1567 n. 10 (noting that "[w]e evaluate the tendency and force of the undisclosed evidence item by

item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion . . . ."). We have followed this approach in our own cases. *See, e.g., Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1355, 1369 (11th Cir.2004), *cert. denied*, --- U.S. ----, 125 S.Ct. 2962, 162 L.Ed.2d 906 (2005); *Zeigler v. Crosby*, 345 F.3d 1300, 1305-06 (11th Cir.2003). In this case the district court followed the appropriate methodology, considering each *Brady* item individually, and only then making a determination about the cumulative impact. We do the same.

A. Neville Butler's Polygraph

The first *Brady* claim relates to a polygraph exam taken by the government's principle witness, Neville Butler. Maharaj contends that the State did not disclose the polygraph examiner's written report that details his conclusions regarding Butler's truthfulness. The record reveals that after Butler was initially deposed, the State asked him to sit for a polygraph examination. The polygrapher asked Butler questions about the events leading up to the murders, what actually happened in the hotel room, and what occurred after Butler and Maharaj left the hotel room. All told, Butler was asked eleven questions.[3]

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[3] The eleven questions were: 1) Did you actually witness that shooting? (Answer-yes); 2) On, or about, October 16, 1986 did you actually see Chris (sic) Maharaj shoot Derrick Moo Young? (Answer-yes); 3) On October 16th did you have knowledge that Maharij (sic) had a gun in his possession before Derrick Moo Young entered the room? (Answer-No); 4) On October 16th did you have actual knowledge that Moo Young was going to be shot before it happened? (Answer-No); 5) On October 16, did you have a gun or any other weapon in your possession at any time before Derrick Moo Young was shot? (Answer-No); 6) To the best of your ability have you now told the complete truth regarding the shooting incident on October 16, 1986? (Answer-Yes); 7) Did Maharaj ask you to arrange a meeting between himself and Derrick Moo Young? (Answer-Yes); 8) On October

In his written report, the examiner concluded that Butler was truthful in answering eight of the eleven questions. As for questions four and six, concerning whether Butler knew Derrick Moo Young was going to be shot before the incident occurred and whether Butler told the complete truth about the shooting incident, the examiner opined that the results were ambiguous and inconclusive. Finally, as to question ten-whether Maharaj remained in a car for two and a half hours following the shooting-the examiner concluded that Butler's response was indicative of deception. In the opinion of the examiner, however, Butler truthfully answered each question that related to the actual events that occurred in the hotel room during the confrontation between Maharaj and the Moo Youngs and to the actual shootings.

The State did not produce the examiner's opinion to Maharaj. It did, however, send a letter to the defendant before trial that stated: As you are aware, the State's eyewitness to this homicide, Neville Butler, has been polygraphed with reference to his knowledge of what transpired in the Dupont Plaza Hotel, room number 1215, on October 16, 1986. As I indicated to you previously, he passed with regard to the questions asked of him as to your client being the shooter in this matter as well as he not being armed or participating in the shootings of the Moo Youngs. However, questioning of Mr. Butler, prior to his polygraph examination and subsequent thereto, has resulted in my obligation under Florida Rules of Criminal Procedure 3.220, to inform you that Mr. Butler had some material corrections and additions to make to the depo-

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16, 1986 did you personally arrange the meeting between Derrick Moo Young and Chris (sic) Maharaj?' (Answer-Yes); 9) Other than what you have explained was anyone else present when the Moo Youngs were shot? (Answer-No); 10) Did you actually remain in a car with Maharaj after the shooting for at least two and a half hours?' (Answer-Yes); 11) Was illegal drug transactions to be discussed at the meeting between Maharaj and Derrick Moo Young?' (Answer-No).

sition testimony he has previously rendered to you. Therefore, please consider this letter as compliance with my obligation for continuing discovery and an invitation to you to redepose Mr. Butler at your convenience regarding events which occurred prior to the homicide as well as post-homicide.

Counsel for Maharaj did redepose Butler, at which time Butler admitted that he lied to police when he gave an initial statement and lied in his first deposition. Essentially, Butler conceded that he lied to police about his role in setting up the murders and about events that happened after the murders in an attempt to lessen his own involvement. Butler did not want to admit to police that he arranged for the meeting between Maharaj and the Moo Youngs at the Dupont Plaza Hotel, so he originally led the police to believe that Maharaj unexpectedly arrived at the hotel room. In fact, counsel for Maharaj cross-examined Butler extensively at trial on this point, and got him to admit on numerous occasions that he had repeatedly lied under oath in the course of this case. However, Butler's testimony describing the actual events that occurred in the hotel room-that portion of the story beginning when Maharaj walked into the room and ending when Maharaj and Butler exited to the elevator-remained consistent from his very first statement to the police through his testimony at trial.

Petitioner contends, nevertheless, that he should have been given the examiner's opinion. He asserted this claim on direct appeal and throughout the post-conviction proceedings. Maharaj does not argue that he was prevented at trial from introducing the examiner's opinion; indeed, Florida law prohibits the introduction of polygraph results absent the consent of both parties, *see Walsh v. State*, 418 So.2d 1000, 1002 (Fla.1982), and the trial judge in this case specifically prohibited the witness from making any mention of the polygraph in the course of his testimony. Instead, Maharaj suggests that if he had known about the results of the test, he could have impeached Butler concerning why he decided to come clean

and testify truthfully. Butler says he did so because his conscience compelled him to tell the truth; Petitioner urges that it was because he was afraid of taking a polygraph test or because he knew he had failed the polygraph test.

On collateral review of the murder conviction, the Florida Supreme Court correctly recited the three components of a *Brady* violation as set forth by the Supreme Court in *Strickler*. *Maharaj III*, 778 So.2d at 953. It then found that there was no *Brady* violation because the defense had knowledge of the polygraph results and because Butler had not actually "failed" the test.

As for the finding that the defense had knowledge of the polygraph results, the district court noted that there was substantial evidence in the post-conviction record to indicate that the defense was not aware of the fact that Butler's answer to one of the questions was indicative of deception. But, the district court observed that even if it were to disagree with the Florida Supreme Court's conclusion, the state high court's finding was *not* an unreasonable one.

We agree. Initially, we note that the Florida Supreme Court did not apply a rule that contradicts governing Supreme Court case law. Moreover, we can find no Supreme Court case whose facts could be considered "materially indistinguishable." Thus, the Florida Supreme Court's decision was not "contrary to" clearly established federal law. Furthermore, the Florida Supreme Court's decision was not an "unreasonable application" of clearly established federal law. Although there is no evidence to indicate that the State actually provided Petitioner with a copy of the examiner's opinion, it did inform Petitioner that the test occurred, that Butler truthfully answered the questions concerning the events in the hotel room, including the circumstances surrounding the shooting, that Butler had "material corrections and additions" to make to his previous deposition testimony, and that defense counsel might want to redepose Butler regarding events that occurred before

and after the homicide. Defense counsel was free to ask Butler why he changed his story and to vigorously cross-examine him concerning the inconsistencies. The Florida Supreme Court's analysis under *Brady* was neither contrary to nor an unreasonable application of clearly established federal law.

Maharaj suggests, however, that he did not want the polygraph results so that he could publish the results to the jury. Rather, he claims the results support his theory that Butler changed his story when he was summoned to face a lie detector test, and that he only changed his story when caught lying by the polygrapher. When viewed in this light, Petitioner's claim must also be analyzed as a potential *Giglio* error, a type of *Brady* violation that occurs when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

"In order to prevail on a *Giglio* claim, a petitioner must establish that the prosecutor *knowingly* used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." *Tompkins v. Moore*, 193 F.3d 1327, 1339 (11th Cir.1999) (internal quotation marks and citation omitted) (emphasis added). The Florida Supreme Court correctly noted this standard, *Maharaj III*, 778 So.2d at 956, and went on to reject Petitioner's claim "because the defendant has failed to demonstrate that the statement was false or that the statement was material." *Id.* at 957.

In explaining why Butler's testimony was not false, the Florida Supreme Court said:

> While the statement concerning an act of conscience may not be entirely true, there has been no showing that it was entirely false. The prosecutors testified at the evidentiary hearing that Butler voluntarily appeared at their office

> after being told that the State wanted to question him about some of his testimony. He was not given immunity and changes were made to the testimony prior to the polygraph. Neither prosecutor indicated that Butler changed any testimony as a result of the polygraph examination. The State opined Butler may have considered his change of testimony voluntary because he voluntarily appeared for further questioning. Based on this record, the State did not suborn perjury.

Id.

Again, we can find no Supreme Court case with materially indistinguishable facts. *See Ventura v. Attorney Gen.*, 419 F.3d 1269, 1281 (11th Cir.2005) (noting that a *Giglio* analysis is a "highly fact-dependent inquiry"). Moreover, the Florida Supreme Court did not apply a rule that contradicts Supreme Court case law. The state court decision was not "contrary to" clearly established federal law on this point either. As for the application of that correctly-stated law, we have little difficulty concluding that it was reasonable for the Florida Supreme Court to find that Maharaj failed to establish that Butler's trial testimony was false. At trial, Butler testified in these terms:

> Q: How is it that you decided to tell the truth about your own involvement in early March of 1987?
>
> A: My consideration was the main factor is that I felt I was holding back when I shouldn't be and I remember that I called to come down to speak with your office and before I was able to start telling you, you started telling me that I had to ask for an appointment and then I came to tell you and as it happened, you started to question me and tell me that I had lied and I just told you the whole story, it was my consideration and you all persisted with your inquiry.
>
> . . .

> Q (On Cross-Examination): But it doesn't bother you to lie after having been sworn under oath to tell the truth, that's correct, right?
> A: I explained earlier last week the circumstances under which I felt I was protecting myself and the reasons for the things I said and I voluntarily agreed to correct the wrongs I had-statements I had made when I approached the District Attorney, State Attorney and told him about it.

There is nothing to indicate the reasons offered for Butler's decision to come clean were other than what he said at trial. Petitioner's belief that the decision to tell the truth was based on a fear of the lie detector test or perhaps fear of the results of that test is speculative. In the *Giglio* context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false. *See Moon v. Head*, 285 F.3d 1301, 1315 (11th Cir.2002); *Brown v. Head*, 272 F.3d 1308, 1317-18 (11th Cir.2001). The Florida Supreme Court's determination that Butler's stated reason for changing his testimony was not false was neither contrary to nor an unreasonable application of clearly established federal law.

Moreover, the Florida Supreme Court determined that the statement was not material, finding that the failure to clarify Butler's reason for the change of testimony would not have affected the jury's verdict. *See Maharaj III*, 778 So.2d at 957. The district court agreed, finding that

> [i]n this instance, there is no reasonable likelihood that the revelation that Butler's change in testimony may not have been based entirely on his own initiative would have affected the judgment of the jury. The important aspect of the change in story was that Butler had shown that he was willing to lie under oath, that he had lied because of concern regarding how his involvement would be regarded by the prosecutors, and that he had told incon-

> sistent stories at various times. That is, it was primarily Butler's change in testimony, rather than the impetus for the change, that would have been important to the jury, and this was all effectively brought out in cross-examination and closing arguments. Moreover, if he did in fact change his story only because of the polygraph examination, that jury never would have learned this, since the judge had specifically warned Butler against mentioning the polygraph exam during his testimony.

We agree with the Florida Supreme Court and the district court that, even if Maharaj had established that Butler's testimony was false (which he did not), the falsehood was not material. Butler was thoroughly and vigorously cross-examined about the inconsistencies in his accounts, and Maharaj's counsel elicited testimony from Butler that he had lied under oath. Moreover, Maharaj's trial counsel was not prevented from asking Butler why he changed his story; indeed, he asked him that very question in the second deposition. There is no reasonable likelihood that the revelation that Butler's change in testimony may not have been based entirely on his own initiative could have affected the judgment of the jury. *See Ventura*, 419 F.3d at 1277-78 (noting that a statement is material under *Giglio* if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury). The Florida Supreme Court's resolution of Maharaj's claims concerning the polygraph report, under both *Brady* and *Giglio*, was neither contrary to nor an unreasonable application of clearly established federal law.

B. The Moo Youngs' Briefcase

Maharaj next claims that the state prosecutors violated *Brady* when they failed to turn over the contents of a briefcase, containing passports and various documents, that the Moo Youngs brought with them to the Dupont Plaza Hotel. The briefcase was taken by the police as evidence and subsequently returned to the victims' family. An investigator working for

Petitioner's trial counsel subsequently asked the police to produce the briefcase and its contents. The police responded that they no longer had the briefcase *and* informed the investigator that it had been returned to the Moo Young family. Petitioner contends that the items contained in the Moo Youngs' briefcase should have been turned over as *Brady* material.

The state post-conviction trial court described the contents of the briefcase as passports for both Duane and Derrick Moo Young, showing travel to Panama, Jamaica, and other countries, international letters of credit, appointments, insurance policies on the victims, and other documents that might suggest the victims may have been involved in transactions involving very large sums of money, and, potentially fraudulent activities. Petitioner contends that these passports and documents would have led to other evidence, which in turn may have shown that the Moo Youngs were killed by a Colombian cartel for trying to siphon millions of dollars while laundering drug money around the Caribbean.

The state post-conviction trial court rejected this claim, finding that there was no *Brady* violation for two independent reasons: first, the briefcase and its documents were not suppressed by the State because Petitioner knew of their existence and had the power to compel their return from the Moo Young family by subpoena, and, second, the information was not material. The Florida Supreme Court affirmed on those same grounds. We agree.

Again, the Florida Supreme Court correctly articulated the *Brady* standard. The trial court did likewise, citing the Supreme Court's decision in *Kyles*. In this case, the defense was plainly aware that the Moo Youngs left a briefcase at the crime scene; an investigator working for Petitioner's counsel approached the police and asked them for it. The officer explained, however, that the briefcase had been returned to the victims' family. At that time, Petitioner knew of the briefcase

and knew how he could obtain it. The police could not give it to him because they no longer had it.

Our case law is clear that "[w]here defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government." *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir.1983); *accord LeCroy*, 421 F.3d at 1268 (noting that there was no *Brady* violation because the defendant could have obtained the information had he used "reasonable diligence"); *Haliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1239 (11th Cir.2003); *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir.1988); *United States v. Cortez*, 757 F.2d 1204, 1208 (11th Cir.1985). The evidence was not suppressed by the state.[4]

Moreover, we agree with the state court that neither the briefcase nor its contents were material. In describing why the briefcase documents were not material, the state post-conviction trial court observed that the documents would not

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[4] Nor is this case at all like the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), where the Court cautioned that "[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696, 124 S.Ct. at 1275. In *Banks*, the prosecutors failed to disclose that a key witness was a paid police informant, and stood by as that witness affirmatively testified to the contrary. The Court rejected the State's argument that the defendant could have more diligently pursued the police officer involved, and in doing so might have discovered the witness' status. The Court summarized the State's argument as one where "'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence.'" *Id.* (citing the oral argument transcript) (alteration in original). In contrast, in this case, the prosecution did not physically possess the documents Petitioner sought, and it made no false or misleading statements regarding what that evidence might show or where it might be found. Indeed, the police unambiguously directed the investigator to where he might obtain the evidence. When the defendant has "equal access" to the evidence disclosure is not required.

have impeached the star witness, Neville Butler, nor refuted testimonial evidence taken from the hotel employees, the fingerprint evidence tying Maharaj to the hotel room, or the ballistics evidence regarding Maharaj's gun. The state court not only found that there was no reasonable probability the proceedings would have been different if the evidence had been disclosed, but went so far as to say that disclosure would not have resulted in a markedly weaker case for the prosecution or a markedly stronger one for the defendant.

The Florida courts' application of the *Brady* rule was reasonable here too. In deciding whether evidence was material for the purposes of a *Brady* violation, the question is not whether the conviction was "more likely" because the evidence was introduced or even whether the evidence "might have changed the outcome of the trial." *Strickler*, 527 U.S. at 289, 119 S.Ct. at 1952. Rather, Petitioner "must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Id.* The word "reasonable" "is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566.[5]

We agree with the state post-conviction trial court that the briefcase documents neither impeached Butler's testimony nor called into question any of the physical evidence recovered

[5] The Supreme Court's decision in *Strickler* is instructive. In *Strickler*, the documents withheld consisted of police interview notes and correspondence between detectives and the state's primary trial witness. The Court held that the documents were not material, finding that the defendant would have been convicted and sentenced to death even if the testifying witness had been severely impeached. *Strickler*, 527 U.S. at 294, 119 S.Ct. at 1954. Here, the contents of the briefcase are not nearly as informative or exculpatory as the documents in *Strickler*.

from the crime scene. At most, they arguably cast the victims in a negative light and raise the bare possibility that the Moo Youngs *may* have been involved in some arguably unsavory activities with other individuals who *may* have had reason to do them harm. This highly speculative chain falls far short of even that quantum of evidence rejected as being insufficient by the *Strickler* Court, and, at all events, does not establish a reasonable probability that the result of the trial would have been different if the documents had not been suppressed. *See Crawford v. Head*, 311 F.3d 1288, 1330-31 (11th Cir.2002) (rejecting an argument similar to the one Petitioner makes here, finding that a police report detailing clothing found at a crime scene was not material, despite the fact that the report could theoretically give rise to the theory that other potential suspects should have been more thoroughly investigated).

The Florida courts' twin conclusions that the briefcase contents were not suppressed by the state and were not material under *Brady* were reasonable, and were neither contrary to nor an unreasonable application of clearly established federal law. Maharaj is entitled to no relief on this claim.

C. The Moo Youngs' Life Insurance Policies

Finally, Maharaj alleges that the State withheld evidence the Moo Youngs had recently purchased large life insurance policies. The Florida Supreme Court found, however, that the policies, which were taken out several months before the murders, were not exculpatory because "there has been no showing that this evidence tends to negate the conviction or the sentence," and "[m]ore importantly," that the disclosure of the policies would not have put the case in so different a light as to undermine confidence in the verdict. *Maharaj III*, 778 So.2d at 953-54. The district court agreed, concluding that the evidence was not exculpatory, that any arguments based on that evidence (or other evidence that may have been discovered as a result of knowing about the policies) was too spec-

ulative to have altered the outcome, and that it could not have been used to impeach the State's primary witnesses.

Our analysis concerning the life insurance policies is similar to the one that governed the contents of the Moo Youngs' briefcase. Maharaj's argument, that the Moo Youngs were involved in shady dealings to the point that they were concerned about their own well-being, and, therefore, executed substantial life insurance policies, is even more speculative than his argument concerning the other contents of the briefcase. The existence of the insurance policies in no way refutes any of the physical evidence and does not impeach any of the State's witnesses. The Florida Supreme Court's resolution of this *Brady* claim was altogether reasonable.

The state post-conviction trial court also considered the cumulative effect of the evidence, and found that there was no reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different. The district court agreed and so do we.

We have carefully reviewed the *Brady* items and readily conclude that there is no reasonable probability, had all of the items been disclosed to the defense, the result of the proceedings would have been any different. There was ample evidence of motive, and significant physical evidence tying Petitioner to the room where the murders occurred. The State's eyewitness, Neville Butler, never wavered as to the most important part of his testimony, describing Maharaj's brutal attacks on the Moo Youngs, and that testimony was corroborated by physical and ballistic evidence. None of the alleged *Brady* items calls into question that portion of Butler's testimony, and none refutes any of the physical evidence. Moreover, Neville Butler was significantly impeached by Petitioner's trial counsel, who extracted numerous admissions from Butler concerning the lies he told at various points throughout this case. Again, the Florida courts' disposition of

this claim was neither contrary to nor an unreasonable application of clearly established federal law.

VI.

Maharaj did not testify at trial. Nevertheless, he argues that this decision was based at least in part on the ineffective assistance of trial counsel. At the state post-conviction hearing, trial counsel testified that he met with Maharaj on a daily basis to discuss strategy, and specifically, the pros and cons of whether Maharaj should testify in his own defense. Trial counsel fully explained to Petitioner his right to testify, and expressed his own opinion that Maharaj should forgo that right. Trial counsel plainly told Maharaj that if he testified, he would be subject to extensive cross-examination concerning the newspaper articles published by Mr. Carberry, which contained various allegations about Maharaj, including those underlying his dispute with the Moo Youngs. Specifically, trial counsel testified that "I advised [Maharaj] that in my opinion he should not testify, that it would only allow the state to argue the innuendo and speculation and I felt it was in his best interest not to take the stand."

At the time trial counsel advised Petitioner, he was under the impression that Maharaj had two outstanding warrants in Great Britain, both of which were allegedly mentioned in newspaper articles. It now appears that the warrants had been resolved at the time trial counsel provided his advice. Maharaj says that trial counsel was ineffective in failing to discover that the warrants had been resolved and that he would have testified had he been provided with competent advice.

The standards for ineffective assistance of counsel are well-established, and were correctly noted by the Florida courts. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established that to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate *both* that counsel's performance was

deficient and that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064. As for the deficiency prong, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. at 2065 (internal quotation marks and citation omitted). And, to satisfy the prejudice prong, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

The Florida Supreme Court found that Petitioner failed to establish either deficiency or prejudice. The court noted as significant that Maharaj did not testify at the state post-conviction hearing, and, therefore, presented no testimony showing that the articles were false or why that fact would have changed his decision. "More importantly, even assuming the falsity of the articles, Maharaj does not negate the fact that he would have been cross-examined on whether the articles made him angry, which is the reason they were relevant." *Maharaj III*, 778 So.2d at 958.

As the district court observed, the Florida Supreme Court's decision was based on its finding that even if the warrants were not outstanding and the newspaper articles were false, trial counsel's main concern was that Petitioner would be extensively cross-examined about how the articles made him feel and how they may have given him reason to dislike the Moo Youngs. This conclusion is amply supported by trial counsel's testimony at the post-conviction hearing, and is left wholly unrefuted.

In undertaking this analysis, the Florida Supreme Court did not apply a rule that contradicts Supreme Court case law, nor did it arrive at a result contrary to one reached by the Supreme Court in a case with materially indistinguishable facts. Additionally, the state court's application of that correctly-stated law was altogether reasonable. *See Darden v. Wainwright*, 477 U.S. 168, 185-86, 106 S.Ct. 2464, 2474, 91 L.Ed.2d 144 (1986) (holding that because there were "several reasons" why counsel might have made a particular decision, petitioner had failed to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). The tactical decision to advise petitioner against testifying because of the dangerous cross-examination that could ensue was utterly unaffected by the truth or falsity of the articles and cannot be a sound basis for a claim of ineffective assistance of counsel. *See McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir.1984) (noting that "[c]ounsel will not be deemed unconstitutionally deficient because of tactical decisions"). Maharaj has failed to show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*).

There is little discussion in the Florida Supreme Court's decision concerning prejudice, and we need not reach that issue here, since Petitioner's claim must fail if either of the *Strickland* prongs are not met. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069; *Turner v. Crosby*, 339 F.3d 1247, 1279 (11th Cir.2003).

VII.

Finally, Maharaj contends that his rights were violated when he was not informed after his arrest that he had the right to contact the British consulate pursuant to the Vienna Convention and the United Kingdom Bilateral Consular Treaty, June 6, 1951, 3 U.S.T. 3426 ("The Bilateral Treaty"). The Florida Supreme Court found that Petitioner was procedurally barred

from raising this claim in collateral proceedings because he had failed to raise it on direct appeal. In the district court, Petitioner argued that the Florida Supreme Court erred in resolving the claim on procedural default grounds, citing a case from the I.C.J., *LaGrand Case (Germany v. United States)*, 40 I.L.M. 1069 (I.C.J. June 27, 2001). The district court found that although the Florida court did not directly cite *Breard,* it correctly followed the Supreme Court's directive in that case.[6]

Maharaj makes similar arguments on appeal: that the I.C.J. is the "ultimate arbiter" of disputes under the Vienna Convention, and that the Florida Supreme Court's decision is contrary to *Avena* and *LaGrand,* both of which he describes as "controlling" authority. We remain unpersuaded.[7]

In the first place, the Florida Supreme Court's decision is not contrary to clearly established federal law; that court did not arrive at a result different from one reached by the Supreme Court in a case with materially indistinguishable facts, and it did not apply a rule that contradicts governing Supreme Court precedent. Indeed, the decision is completely consonant with the Supreme Court's decision in *Breard*, where, as we have noted already, the Supreme Court clearly

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[6] Petitioner treats the two treaties identically. In his brief, he indicates that any reference to the Vienna Convention should be treated as a reference to both. In an amicus brief, the Government of the United Kingdom of Great Britain and Northern Ireland presents discussion of only The Bilateral Treaty. However, it cites no cases with any substantive discussion of the Bilateral Treaty; the only cases cited with a substantive discussion of either refer to only the Vienna Convention. Neither the Florida Supreme Court nor the district court differentiated between the two. And, we have been unable to locate any case law comparing the two treaties. Accordingly, we assume, without deciding, that the two treaties should be treated in a similar fashion.

[7] *Avena* was not decided until after Petitioner had completed his briefing in the district court. Thus, although it was not cited in Petitioner's filings, it was referenced in the district court's order.

held that a petitioner who had failed to raise his Vienna Convention claim in state post-conviction proceedings was barred from doing so in federal court. *Breard*, 523 U.S. at 375, 118 S.Ct. at 1354 (rejecting the argument that the Vienna Convention is the "supreme law of the land," and therefore trumps procedural bars, as "plainly incorrect").

Breard did not involve an identical fact pattern to the case at bar. In *Breard*, the defendant raised the Vienna Convention claim for the first time in federal court, having failed to do so at trial or before the state post-conviction court. Here, Petitioner brought his claim for the first time before the state post-conviction court, having failed to do so before the state trial court. There is nothing in *Breard*, however, to suggest that the timing of the procedural default has any significance. The Court's holding that a Vienna Convention claim must be raised in conformity with both the laws of the United States and the laws of the state of conviction, *see id.*, means that a procedural bar can apply no matter when that bar occurred.

Petitioner directs us to the cases of *Avena* and *LaGrand*, where the I.C.J. held that it was error to dispose of a claim under the Vienna Convention by use of a procedural bar. Petitioner cites no authority, however, for the proposition that precedent from the I.C.J. is binding upon this or any other state or federal court in the United States. Unsurprisingly, we were unable to find *any* controlling case law permitting us to ignore the rulings of the Supreme Court of the United States in favor of one from an international tribunal. Because Petitioner failed to raise his claim in conformity with the laws of the State of Florida, the Florida Supreme Court did not arrive at a result contrary to Supreme Court precedent. For similar reasons, the Florida Supreme Court's decision was not an unreasonable application of clearly established federal law.[8]

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[8] The Florida Supreme Court did not specifically cite *Breard*. However, a state court need not cite to, nor even be aware of Supreme Court cases,

VIII.

The district court's COA was limited to six issues, and we decline petitioner's invitation to consider any others. Moreover, there is no reasonable probability that Petitioner's newly filed state action will resolve or moot the issues pending before us, and we deny his request for a stay. As for the merits of Petitioner's claims, the Florida Supreme Court's decision was neither contrary to nor an unreasonable application of clearly established federal law, and, therefore, we affirm in all respects the decision of the district court.

AFFIRMED.

"so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 25, 2006]

No. 04-14669-BB

KRISHNA MAHARAJ,
Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
JAMES V. CROSBY, ATTORNEY GENERAL OF FLORIDA,
CHARLIE CRIST,
Respondents-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: HULL, MARCUS and HILL, *Circuit Judges*.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14669-B

KRISHNA MAHARAJ,
Appellant,

v.

SECRETARY, Florida Department of Corrections,
Appellee.

On appeal from the Southern District of Florida,
Miami Division, No. 02-22240-CV-PCH

MOTION FOR A CERTIFICATE OF APPEALABILITY

BENEDICT P. KUEHNE
Sale & Kuehne
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, Fla. 33131-2154
(305) 789-5989

* CLIVE A. STAFFORD SMITH
636 Baronne Street
New Orleans. La. 70113
(504) 558-9867

* Counsel of record

MOTION FOR CERTIFICATE OF APPEALABILITY

Petitioner respectfully files the following Motion for a Certificate of Appealability (COA) with respect to the District Court's *Order on Report and Recommendation* (hereinafter "*Order*"), relying with respect to each individual issue on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as other law specifically set forth below.

STATEMENT OF THE CASE

Krishna Maharaj, the Petitioner-Appellant, is a British citizen currently being held at the Union Correctional Institution in Raiford, Florida. He was born in Trinidad on January 26th, 1939, when Trinidad was still subject to British rule. As such, he was born with British nationality. Mr. Maharaj remains a foreign national, with all the rights and benefits of a British national abroad. The British government was not timely notified—indeed, it has never been properly notified—that a British national was being charged with this very serious offense, as required by international law.

Appellant was charged by indictment dated November 5, 1986, with two counts of first degree murder and related offenses, (Tr. 1-5a) He was charged with the deaths of Derrick and Duane Moo Young in the Dupont Plaza Hotel on October 16, 1986. Appellant was tried by a jury from October 5 to October 19, 1987. The jury rendered verdicts of guilty as to two counts of first degree murder, two counts of kidnaping with a firearm, arid unlawful possession of a firearm while engaged in a criminal offense. (Tr. 4184-4187)

At the penalty phase, the jury recommended life imprisonment for the murder of Derrick Moo Young and the death penalty for the murder of Duane Moo Young. (Tr. 4498-4499) On December 1, 1987, the trial court imposed the death penalty on Count II for the first degree murder of Duane Moo Young, consecutive terms of life imprisonment as to

Counts I, IV, and V, and 15 years imprisonment consecutive on Count VII. (Tr. 1783-1784)

After imposition of sentence, Mr. Maharaj was declared indigent. He has been indigent at all times since then, incarcerated under a sentence of death. Before the preparation of the record on appeal, Mr. Maharaj moved for a stay of appellate proceedings and for relinquishment of jurisdiction to file a writ of error coram nobis based on newly discovered evidence generated by the law firm of *Shutts & Bowen*. That law firm was investigating the claim of Shaula Ann Nagel to the $1,000,000.00 (one million dollar) life insurance policies taken out by each of the victims shortly before their deaths. This investigation revealed the involvement of the victims, the Moo Youngs, in illegal business transactions including a $100,000,000,00 (one *hundred* million dollar) fraudulent letter of credit and narcotics trafficking. Furthermore, this newly discovered evidence revealed that the discovery deposition of Nagel, relied upon by the defense, had been substantially untrue. Some, but not all, of this evidence was made available to Mr. Maharaj at that time.

The Florida Supreme Court granted the defendant's motion and relinquished jurisdiction for a period of 90 days for the conduct of an evidentiary hearing on Mr. Maharaj's claims. *State v. Maharaj* (1990 Order) (*Maharaj I*). Mr. Maharaj was never provided with counsel. For this reason, no hearing was held before expiration of the ninety days.

On direct appeal, the Florida Supreme Court affirmed Mr. Maharaj's convictions and sentences, *Maharaj v. State*, 597 So. 2d 786, 17 FLW S201 (Fla. March 26, 1992.) (*Maharaj II*). The United States Supreme Court denied certiorari on January 11, 1993. *Maharaj v. Florida*, 506 U.S. 1072 (1993). Justice Blackmun voted to grant certiorari.

Mr. Maharaj then filed a state petition for post-conviction relief in November 1993. It was originally denied without a

hearing by Judge Leonard Glick. The Supreme Court of Florida later determined that Judge Glick should have been disqualified from sitting, since he had been a supervising prosecuting attorney on the case. In addition, the Court held that a hearing should have been held on the substance of the petition. *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996) (*Maharaj III*). The Court ordered that "a hearing [be held] on Maharaj's motion, which hearing shall commence within ninety days from the date this opinion becomes final." *Maharaj III*, 684 So.2d at 728. The hearing should have begun by March 10, 1997. Appellant pressed for a speedy and adequate hearing. However, he was repeatedly denied funds or any resources for his defense, The hearing did not take place until October 1997. A week-long hearing was held before Judge Jerald Bagley. (3.850 Tr. 135-1137)

The trial court granted relief as to Appellant's death sentence, finding that his death sentence had been illegally imposed since the trial judge had solicited the prosecution, *ex parte*, to prepare an order sentencing Appellant to death before the judicial sentencing hearing even took place. However, the trial court refused to grant relief as to Appellant's convictions (3.850 Clerk Tr. 6576), or his non-capital sentences.

Appellant therefore appealed, asking the Florida Supreme Court to vacate his convictions and sentences. On November 30, 2000, that court denied him all relief. *Maharaj v. State*, 778 So.2d 944 (Ha. 2000) (*Maharaj IV*). Rehearing was denied on January 24, 2001.

Appellant sought to challenge his convictions in federal court at that time, but was denied the right to do this until he had undergone a resentencing trial. This took place in 2002, and he was sentenced to life imprisonment on the final charge against him.

His remedies exhausted, Krishna Maharaj brought his Petition for a Writ of Habeas Corpus challenging his convictions and his non-capital sentences. The magistrate recommended that relief be denied and, on August 30, 2004, the District Court likewise denied all relief.

Appellant notes that the District Court has already entered an order granting a COA with respect to certain claims. However, as the District Court recognizes in its order, an application for a COA "shall be issued only after a notice of appeal of appeal is filed." *Order* at 59 n.49. Further, the District Court does not specify whether a COA is granted or denied with respect to other issues. He therefore files the following motion for a COA before this Court with respect to the issues not addressed by the lower court.

STATEMENT OF FACTS

Krishna Maharaj, a British citizen, was born in Trinidad on January 26th, 1939. He moved to England in 1960, and lived there until 1985. He became a very successful businessman, In 1985 he began to spend time in Florida, since he had investments in real estate in the Fort Lauderdale area. He hoped to divide his time between England and Florida after he retired.

Since his 1987 conviction, the British public has learned of the facts of this case through such documentaries as Murder in Room 1215, by Channel 4. The public concern has reached such a pitch that a Queen's Counsel, a Member of Parliament, and a member of the Diplomatic Service were all present at the hearing in state court. (3.850 Tr. 222) In District Court below, the British Government sought leave to file a brief as *amicus curiae* on Mr. Maharaj's behalf.

The State's case at trial stretched credulity. We now know it was false, and relied heavily for its success on defense counsel's failure to prepare, and the State's suppression of extremely favorable evidence. Mr. Maharaj had once been

friends with a Jamaican who had moved to the United States, Derrick Moo Young, but they had fallen out. The State insisted that their declining relationship was accurately described in various articles published in a local tabloid, the Caribbean Echo, by one Estee Carberry. These detailed Mr. Maharaj's supposed frauds on the Moo Youngs and pending criminal charges in England, and their publication was meant to be the motive for Mr. Maharaj's crime. *Maharaj I* at 788. The jury did not hear that virtually every fact (including the criminal charges) was known to the prosecution to be false, that the Moo Youngs were actually perpetrating the frauds on Mr. Maharaj, and that the extent of Mr. Maharaj's "revenge" was to start a rival newspaper, the Caribbean Times, which was committed to rise above such scandalmongering, and never even mentioned Carberry or the Moo Youngs.

Supposedly, Mr. Maharaj asked Neville Butler, a recent acquaintance, to set up a meeting with the Moo Youngs in Room 1215 of the Dupont Plaza Hotel, whereupon Mr. Maharaj shot both of them in Butler's presence. Concededly, Mr. Maharaj's fingerprints were found in the room. According to Det. John Buhrmaster, Mr. Maharaj denied ever being in the room. This was very damaging since it was clearly false. Yet according to the deposition of another officer, Buhrmaster had previously said that Mr, Maharaj had admitted to being in the room. The jury never heard this because trial counsel did not present it.

Indeed, Mr. Maharaj was seen by an independent witness sitting in the room alone reading a newspaper, shortly after 8 a.m., although the prosecution had evidence that the Moo Youngs were scheduled to arrive at 12:15 p.m., around the time they were murdered. There was no sensible, incriminating reason for Mr. Maharaj being there that early. However, he has consistently insisted that Butler had arranged for him to meet Eddie Dames, a friend of Butler's from the Bahamas, about distributing the Times in the islands. He left

before 10 a.m. because Dames never showed. Mr. Maharaj had alibi witnesses who placed him in Fort Lauderdale at the time the crime took place. Yet counsel advised him not to testify and failed to speak with most of his alibi witnesses, much less call any of them. The jury never heard this critical evidence.

The State also presented evidence from one Tino Geddes, another Jamaican, who had initially confirmed Mr. Maharaj's alibi, but by the time of trial testified to outlandish stories about Mr. Maharaj buying camouflage uniforms for a ground assault on the Moo Young home, His stories were pure fantasies.

At trial, although he was the State's star witness, Butler's story was flimsy. He supposedly arranged for Mr. Maharaj to meet with the unsuspecting Moo Youngs in Dames' room. Dames allegedly knew nothing about the planned crime, and was off shopping with an associate from the Bahamas, Prince Ellis, at the time of the murder. Ellis has now recanted the testimony he gave for the State, and admitted that Dames was involved in drugs and in the crime, and that Mr. Maharaj was framed.

As the "eye witness," Butler testified that Mr. Maharaj shot the Moo Youngs using only one glove—à la Michael Jackson. Butler then said that the two of them sat in a car at a meter outside the hotel for three hours watching the police, waiting for Eddie Dames-Godot, because Mr. Maharaj supposedly wanted to verify that Dames actually existed (although Butler previously said that Mr. Maharaj and Dames had met in the lobby earlier).

If Butler was to be believed, then Mr. Maharaj was guilty; if not, Mr. Maharaj was acquitted. Yet the State suppressed critical impeachment evidence, and even lied to the judge (and this Court), saying that Butler had passed a polygraph test. In truth, he had failed it in significant part. Mr. Maharaj had passed such a test asserting his innocence.

Indeed, the State's case never made any sense, even in 1987. It defies belief that Mr. Maharaj planned to commit a murder in the Dupont Plaza hotel, where he was well known, using a gun that was not silenced, in a room registered to a man he did not know who could come in at any moment.

Mr. Maharaj had nothing to do with this crime. Who did? The key lies in the suppression of an unparalleled amount of *Brady* material by the State, The State had materials in its files to prove that Derrick Moo Young, supposedly a "disabled businessman" with no income, was offering various Caribbean governments loans of up to *five billion dollars*. Far from Mr. Maharaj being the only person who had an axe to grind with the Moo Youngs, there were others with a far stronger motive to kill.

The Moo Youngs were laundering drug money. The records reflect that they were trying to skim money—millions of dollars—off the top. The State knew from a phone record that Adam Amer Hosein had been in contact with Eddie Dames at Dupont Plaza that day. Hosein and Dames have been linked to F. Nigel Bowe, a former Bahamian attorney who, in 1985, had been charged with a large drug trafficking scheme involving the Medellin Cartel. The Moo Youngs held a corporation called Cargil International that was negotiating to purchase a bank for $600 million in Panama. The address of the Bahamian office of Cargil was Nigel Bowe's law office. Hosein, who supposedly had no links to the victims, was actually an officer in another Moo Young corporation, Amer Enterprises, that bore his middle name. Prince Ellis now admits that Eddie Dames was a drug dealer in the Bahamas. Dames, Butler and others framed Mr. Maharaj for this crime.

Normally, cases such as this focus primarily on technical issues that, while very significant, may bear little relationship to the most important issue of all: Whether the individual is actually guilty of the crime for which the State seeks his

death. This is not the case here. Appellant is innocent of these charges.

However, there is an additional ground that helps to explain the anomaly of his conviction, and that is the horrifying saga of judicial misconduct in his case. Several months before the trial, Judge Howard Gross sent ASA Myra Trinchet as his go-between to solicit a bribe from Mr. Maharaj to fix his case. Mr. Maharaj indignantly refused, and reported the incident to his attorney who, in turn, informed the State, Although Paul Ridge and John Kastrenakes, who prosecuted Mr. Maharaj, worked with Trinchet, they did nothing about it. Meanwhile, his bribery spurned, Judge Gross became hostile to the defense. Then, in an FDLE sting that took place during Mr. Maharaj's trial, Judge Gross was arrested and charged with accepting bribes in other cases.

Defense counsel failed to discuss the obvious link between the arrest and the prior solicitation of Mr. Maharaj, and advised his client to proceed with the trial. Judge Harold Solomon was appointed and he, in turn, had several *ex parte* communications with the State, asking the prosecutors to write his order sentencing Mr. Maharaj to death before the judicial sentencing hearing had even begun. While this was the basis for the trial court vacating the death sentence, it leaves absolutely no confidence in the fairness of Mr. Maharaj's trial.

Kris Maharaj is an innocent man who has struggled for almost 18 years to clear his name. He must now be allowed a new trial in which to do so.

THE APPROPRIATE LEGAL STANDARD FOR A COA

We begin first with a brief analysis of the appropriate legal standard for issuing a COA. It is a lenient one. A COA shall issue if the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253 (c) (2). Any doubts should be resolved in favor of the applicant. See

Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir. 1997) ("We resolve doubts about whether to grant a COA in favor of the petitioner").

To deny a COA on the issues presented below would mirror the error in *Miller-El v. Cockrell*, 537 U.S, 322, 123 S.Ct. 1029, 154 L.Ed.2d 931, 2003 WL 431659 (Feb. 25, 2003), In *Miller-El*, the Court elaborated on the limits of the proper analysis for determining whether to issue a COA as follows:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Id., 2003 WL 431659 at *10. Importantly, the Court went on to note:

> We do not require petitioner to prove . . . that some jurists would grant the petition for habeas corpus, Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. at *11; see also *id.* at *12 ("At this stage, . . . we only ask whether the District Court's application of [law] . . . was debatable amongst jurists of reason.").

A COA should obviously be granted where there is a reasonable argument in favor of Appellant's claim under current circuit or Supreme Court case law. However, this Court must also ask whether the issue is debatable by any reasonable jurist. Nothing in the legal formulation says that an issue must be debatable among jurists of reason in a *particular circuit*. For example, as the Court held in *Rudd v. Johnson*, 256 F.3d 317 (5th Cir. 2001):

> An applicant makes a substantial showing when he demonstrates that his application involves issues that are *debatable among jurists of reason*, that *another court* could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further.

Id. at 319 (emphasis supplied; citations omitted). As the Court made quite clear in *Miller-El*, Appellant need not even show that another court, or another judge, would resolve the issue a different way, but simply that such a judge could or might.

We proceed under this standard.

ISSUES WHERE A COA HAS ALREADY APPARENTLY BEEN GRANTED

There are various issues where the District Court has already indicated that a COA has already been granted, which Appellant identifies as the following:

B. *Brady* Violations. *Order* at 15-22. However, this appears to be limited to "(1) a transcript of Neville Butler's statements during a polygraph examination conducted by the State, (2) the contents of the Moo Youngs' briefcase, and (3) information concerning the Moo Youngs' life insurance policy [*sic*]." *Order* at 17. The District Court only finds "that in these three areas, Appellant has made a substantial showing of a constitutional violation sufficient to entitle him to an appeal of these issues." *Order* at 22.

E. The constitutional right to testify. *Order* at 39-44. The District Court granted a COA on both the substantive right to testify, and the claim that any waiver was invalid because either it was involuntary or the fruit of ineffective assistance of counsel. *Id.* at 43-44.

I. The lack of Consular notification. *Order* at 52-58. Given recent international pronouncements, the District Court properly determined that a COA should issue on this point. *Id.* at 58.

ISSUES WHERE IT IS NOT CLEAR A COA HAS BEEN GRANTED OR DENIED: THIS COURT SHOULD GRANT A COA WITH RESPECT TO EACH

The District Court identifies various issues in its *Order*, but nowhere mentions whether a COA should be granted or denied with respect to that issue. These include the following (each of which, respectfully, merits a COA):

I. WHETHER A FEDERAL DISTRICT COURT IS WHOLLY WITHOUT POWER TO PROVIDE ANY FINANCIAL ASSISTANCE TO A HABEAS PETITIONER WHO CHALLENGES A "NON-CAPITAL" STATE CONVICTION

This Magistrate judge identified this issue as a federal constitutional claim. *See, Objections to Magistrate's Report at § V* ("As a preliminary matter, the issue is not one of *right*, but whether this Court should exercise its discretion—no matter what the facts—to hold a hearing") (emphasis in original). However, as the District Court notes, the main thrust of Appellant's argument that lie has suffered from a total lack of resources from any governmental authority—state or federal —in order to pursue his legal claims is that he has not had a fair opportunity to develop and present his claims. Extraordinarily, the District Court responds by ruling that it has *no authority at all* to order funds for the critical investigation,

expert assistance and evidentiary development that has never taken place in this case:

> while Petitioner claims in his Objections that this Court has discretion to order funding because the lack of state funding in the state proceeding denied him a full and fair hearing. Petitioner has pointed to no statute, case law, or other authority which would permit, much Less require, this Court to provide funding for pursuit of this federal petition. In fact, although AEDPA provides for counsel and resources for indigent federal petitioners in *capital* cases, that statute does not provide for any discretionary or required funding for *non-capital* defendants, 28 U.S.C. § 2261(b). Because Petitioner's death sentence was converted to a life term on resentencing, he is not eligible for the special habeas provisions that apply to capital cases. Thus, this Court cannot order either the Florida state government or the federal government to provide the funding he has requested.

Order at 9-10 (emphasis in original).

As the District Court concedes, it is clear that such funding is mandatory in capital cases. The mandatory rule has been established for good reasons. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 (1994) ("[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified"); *Patterson v Johnson*, 2000 U.S.Dist. LEXIS 12694, *5-6 (N.D Tex. Aug. 31, 2000) ("it makes little sense to force Patterson to first try to make a good faith claim of a constitutional violation before supplying him with the resources to investigate the claim's factual basis and validity [and] . . . [t]his is especially true of a claim that may have been procedurally defaults in the state-post-conviction forum for which Patterson must also allege and prove not just 'cause' for the procedural default, but 'prejudice' as well").

It is an extraordinary suggestion that a federal district court, established under Article III of the U.S. Constitution, does not have the *power* to provide necessary resources to an indigent person claiming that he is the victim of a miscarriage of justice. The appointment of counsel and any resources concomitant with such appointment is always within the Court's discretion. As Professors Hertz and Liebman note:

> In noncapital habeas corpus cases, Rule 8(c) of the Habeas Corpus rules makes clear that judges have the discretion to order "the appointment of counsel under [the Criminal Justice Act] at *any stage of the case* if the interest of justice so required."

Hertz & Liebman, Federal Habeas Corpus Practice & Procedure, at 608, § 12.3a (Bender, 2001) (emphasis in original). Rule 8(c) of the Rules Governing § 2254 Cases ("These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires"); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) ("in habeas corpus cases, counsel must be appointed for qualified indigents when a when a hearing is required; the court may appoint counsel at any earlier stage if it deems appointment desirable"). The rules governing the CJA appointments make it equally clear that this discretion carries with it the authority to provide funds to an indigent prisoner for investigation and experts, even when the prisoner proceeds *pro se*, or has the benefit of retained or *pro bono* counsel.[1]

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[1] As provided in the rules governing the defender services organizations (as set forth on the Defender Services website), such funding is always *permitted*, even when not required, for someone in Petitioner's shoes:

Chapter III AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE, EXPERT OR OTHER SERVICES

Part A. General.

3.01 Availability.

This is not a question of whether reasonable jurists could differ. With all due respect, the District Court's decision is simply erroneous as a matter of law. As such, it must clearly be reversed. For example, in *Maoline v. Freake*, 650 F.2d 885 (7th Cir. 1981), the court reversed the denial of counsel and resources to the petitioner, because the court did not exercise its discretion under the proper rule of law. The Court held that to deny counsel is "not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles. . . ." *Id.* at 886-87, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).[2]

A. Investigative, expert or other services necessary to adequate representation, as authorized by subsection (e) of the Act, shall be available to persons who are eligible under the Act, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services.

* * *

B. Persons who are eligible for representation under the Criminal Justice Act, but who have elected to proceed pro se, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with subsection (e) of the Criminal Justice Act (emphasis added).

The court should authorize subsection (e) services for pro se litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by Criminal Justice Act panel attorneys. However, in matters in which appointment of counsel is discretionary pursuant to subsection (a)(2) of the Act, the court should make a threshold determination that the case is one in which the interests of justice would have justified the furnishing of representation, prior to approving the requested services for pro se litigants.

Section 3.10 deals with investigators, allowing them where necessary to the case; Section 3.11 deals with mental health experts; Section 3.13 deals with depositions and fact witnesses; and so on.

[2] Indeed, the District Court issued its *Order* just before it could have benefited from the investigation that Appellant was finally able to conduct in the Caribbean, thanks to limited funds unexpectedly coming available from the United Kingdom. The preliminary results of this investigation are set forth in the affidavit of the investigator, attached as *Exhibit A*. This

II. WHETHER A FEDERAL DISTRICT COURT MAY PROPERLY ASSESS AN ALLEGED *BRADY* VIOLATION PIECEMEAL, RATHER THAN REVIEW IT IN ITS TOTALITY

As noted above, the District Court finds "that in . . . three areas [of alleged *Brady* violations], Petitioner has made a substantial showing of a constitutional violation sufficient to entitle him to an appeal of these issues." *Order* at 22. With respect to the "various other *Brady* claims, the Court agrees with the Florida Supreme Court that no constitutional violations occurred." *Order* at 22. This includes the evidence of Hosein's involvement in the murders, *id.* at 22-23, notes made by the police concerning Appellant's invocation of his rights, *id.* at 23,[3] the Carberry memo, *id.* at 24,[4] the other

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further illustrates the prejudice that Appellant suffered from being denied resources at the appropriate moment.

[3] As with various others, the District Court views the issue in one dimension, without acknowledging the ways such evidence would have been put to use. For example, Det. Buhrmaster's failure to acknowledge (or specific plan to be about the fact) that Petitioner asserted his rights reflected on Buhrmaster's bias, in addition to supporting issues involving suppression. (3.850 Clerk Tr. 2021) ("Buhrmaster and Amato go to jail at 12:18am with Maharaj. (D invokes his right to attorney.) *FORGET THIS.*"). Likewise, the notion that Buhrmaster wrote notes that he should admit facts "only if Eric [Hendon, defense counsel] ask [*sic*] about this", *id.* at 24 n.20, is incredibly damning. It takes little imagination to see how a defense lawyer could shake the witness' credibility by showing that he has written a "script" of what he should and should not say before the jury.

[4] With respect to the Carberry memo, again the issue is not only "the surley [sullied?] reputation of both Carberry and the newspaper he ran." *id.* at 24, but also the bias with which the police acted in failing to follow up this information about a significant prosecution witness. *Kyles v. Whitley*, 514 U.S. at 446 (the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation"), citing *Lindsey v. King*, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (impeachment evidence might have

persons with guns that could have been used in the crime, *id.* at 24, and the fact that the gun that the prosecution argued was the murder weapon had been taken from Appellant long before the crime by the police. *Id.* at 25.[5]

It is not clear, beyond this, what the District Court has and has not considered. For example, no mention is made (in the *Brady* context) of the plethora of evidence concerning the Caribbean Echo newspaper articles. The Court discusses them only in the context of ineffectiveness. *Order* at 33-34. With all due respect, regardless of the state court's ruling on the admissibility of the articles,[6] the *Brady* violation surely must include the defense's ability to prove false all of the articles that were introduced against the accused, dissolving the taint that inevitably blemished Appellant's character. *Cf. Order* at 42 (Florida Supreme Court "not[ed] that [Appellant] had not

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had effect of the "discrediting, to some degree, of the police methods employed in assembling the case against him"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986), *cert. denied*, 479 U.S. 962, 107 S.Ct. 458, 93 L.Ed.2d 404 (1986) ("The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation").

[5] It is difficult for Petitioner to comprehend how the District Court can ratify the idea that the issue was "fully presented before the jury for its consideration", *Order* at 25, when the critical evidence for the defense—the notes in the police file and the testimony of an independent witness—was not presented to the jury to refute the false testimony of law enforcement.

[6] It is difficult to credit how the state court could legitimately rule that the articles were admissible on direct appeal (before the *Brady* material came to light) and then rely on this ruling as *res judicata* in post-conviction. Clearly, there is a reasonable probability that the defense counsel could have prevailed on a pretrial motion to exclude the actual articles as more prejudicial than probative if he had been able to prove false all the allegations contained therein.

provided any evidence or proposed testimony as to the falsity of the articles").

Neither is it clear whether the District Court intended to include the various facets of the particular *Brady* issues that are certified for review. For example, the District Court deals with the polygraph issue as if it raises nothing more than inconsistent statements made by Butler in the course of his polygraph. Not until much later in the *Order* does the Court address—in the context of a *Giglio*[7] claim—the fact that Butler lied about why he changed his testimony. *Order* at 27 ("It appears likely from the testimony that he, in fact, changed his testimony because he was confronted with either the request to take a polygraph or with the results of the polygraph.").[8] This aspect of the claim is also of great significance because this was not simply evidence that Butler *had* previously lied to the police (explained away by his purported concern about the prosecutors, *Order* at 27), but was evidence that Butler was actively and repeatedly lying to the jurors at the time of his testimony.

Neither does the District Court mention the document in the police files that demonstrates that the prosecution were scheming to cover for Butler's changes in testimony.[9] This

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[7] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[8] In fact, this is erroneous as well. Butler did not change his testimony because of the *results* of the polygraph (*e.g.*, he steadfastly stuck to his ridiculous story that he and Mr. Maharaj remained outside the Dupont Plaza waiting for Godot/Dames for three hours, despite "failing" the polygraph on this point). Rather, he changed his testimony because he was taken into the woodshed and browbeaten by the prosecutors. Thus, the District Court's concern that the witness could not mention a polygraph. *Order* at 27-28, is similarly misplaced.

[9] A note in Det. Buhrmaster's file reflects:

CROSS EXAM:

1."Nevells [*sic*] change"—He never has changed his story about how it happened, he just changed on 02 Mar 87, that he did in fact set up this

links into the Butler *Brady* violation in a critically important way: The defense could have shown through Det. Buhrmaster that the prosecution had hatched a plot to paper over the flaws in its case. *Kyles v. Whitley*, 514 U. S. at 445 ("Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

Indeed, it simply makes no logical sense for the District Court to grant a COA on three aspects of the Brady violation, yet determine that "the Florida courts were reasonable in finding that any *Brady* violation due to the failure to disclose these documents [and other matters], either individually or cumulatively, would not have affected the outcome of the trial." *Order* at 25. How can the requisite cumulative assessment of potential prejudice result in a COA with respect to three elements of the *Brady* claim, yet not with respect to the same three elements plus all the rest of the evidence?

There is even more room to doubt the conclusion when the District Court cites to the state court's twice-wrong legal standard in support of its conclusion. *Order* at 25, *quoting Maharaj PCR Order* at 21 ("The Court concludes that the evidence would not produce a different result on a *retrial*[10]

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meeting and what Maharaj was going to do there (exception he committed the murder)

2. He was afraid that he was also involvement [sic] in the murder.

3. It's still unknown what status of N. Butler & what will happen to him pending arrest.

(3.850 Clerk Tr. 2027)

[10] The proper question is not whether Petitioner has shown that the outcome of a new trial *will* be different, or even that the result of the earlier trial *would have been different*, but whether the evidence undermines con-

because of the *sufficiency of the evidence*[11] to sustain the defendant's conviction.") (emphasis supplied; *see also id.* at 25 ("it is *unlikely* that . . . the other evidence that Petitioner claims would have been developed . . . would have had any effect") (emphasis supplied).[12]

III. WHETHER THE COURT COULD REASONABLY RULE THAT A EVIDENCE THAT THE STATE'S STAR WITNESS COMMITTED PERJURY BEFORE THE JURY WAS IMMATERIAL

In the context of the *Giglio*[13] claim, the District Court seemingly accepts the fact that Butler lied about why he changed his testimony. *Order* at 27 ("It appears likely from the testimony that he, in fact, changed his testimony because he was confronted with either the request to take a polygraph or with the results of the polygraph."). In fact, Butler did not change his testimony because of the *results* of the polygraph, because he did not change some aspects of the story on which he failed the test—*e.g.*, he steadfastly stuck to the story that he and Mr. Maharaj remained outside the Dupont Plaza waiting for Eddie Dames-Godot for three hours after the murder, despite having "failed" the polygraph on this point. Rather, he changed his testimony because he was taken into the woodshed and browbeaten by the prosecutors.

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fidence in the fairness of the trial. *Banks*, 2004 U.S. LEXIS 1621, at *67-68, quoting *Kyles*, 514 U.S. 419 at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

[11] *Kyles*, 514 U.S. at 453 ("the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict") (footnote omitted).

[12] This is also erroneous, since the proper standard is not whether something is "unlikely" or not.

[13] *Giglio v. United States*, 405 U.S. 150 (1972).

However, the Court rules that this was not "material." *Order* at 27. The Court suggests that the jury already knew that Butler "was willing to lie under oath." *Id.*

To be sure, Butler had previously lied under oath, but there was no other clear proof at trial that he was lying under oath at the time of his testimony. Appellant must surely be granted a COA on this issue for two reasons. First, Appellant knows of no case where the government suppressed evidence that it star winless (the only witness with any direct evidence against Appellant) committed perjury in front of the jury—boldly taking the witness stand and lying. It is one thing to tell a false story to the police in the first place, and subsequently correct the testimony in time for trial. Nobody gets prosecuted for this, much as perhaps they ought to. It is quite another thing, to lie under oath before the jury. Had these falsehoods been exposed at the time of trial, the jury would not only have known that Butler was exposed to many years in prison for perjury, but would have also asked why the State was vouching for him as a witness rather than prosecuting him for a felony.

Second, there is a procedural issue of great significance here. The District Court properly reached the conclusion that Butler lied, despite the fact that the state court did not so conclude. The state court adopted the partial pregnancy approach to perjury: "While the statement concerning an act of conscience may not be entirely true, there has been no showing that it was entirely false. . . ." *Order* at 27, quoting *Maharaj IV*, 778 So.2d at 957. The District Court implicitly accepts that this cannot be the law, and therefore should reject the state court's conclusion as a matter of law. Yet the District Court does not engage in any analysis concerning how a federal court should revisit a legal issue where the state court manifestly applied the wrong legal standard.

Thus, a COA is appropriate on this issue as well.

IV. WHETHER A COA SHOULD ISSUE ON THE QUESTION OF INEFFECTIVENESS OF COUNSEL

On the issue of ineffective assistance of counsel (LAC), the District Court falls into a similar logical hole to the *Brady* issue. The District Court fails to address, in the context of an overall claim of ineffectiveness, the issue of Appellant's testimony, but leaves this until later in the order. *Order* at 39-44. Because the issue is of critical importance, the District Court grants a COA on it. *Order* at 43-44. Once again, however, the Court cannot grant a COA on one aspect of the LAC claim, and deny it on the rest, since the resolution of an IAC claim looks to the totality of the trial.[14] *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (when reviewing counsel's effectiveness, court must look to "all the circumstances" of the trial).

Indeed, a COA must be granted on the totality of the IAC claim. First, the District Court falls into a legal error in its analysis, tainting its ultimate conclusion. The District Court refers to the "procedural default" that allegedly bars some of Appellant's claims. *Order* at 28-29. While the Court purports not to apply the procedural bar,[15] actually is seems clear that

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[14] On the issue of IAC with respect to Petitioner's testimony, Petitioner notes that it is not true that he "had not provided any evidence or proposed testimony as to the falsity of the articles. . . ." *Order* at 42. Petitioner presented a plethora of such evidence, as noted in passing elsewhere in the ruling: "A considerable portion of this Petition is devoted to showing how the admission of the newspaper articles negatively affected the outcome of this case and arguing that, but for *Brady* violations and ineffective assistance of counsel, the articles would have been excluded." *Order* at 33. The same evidence proved their falsity.

[15] Petitioner notes that the District Court states in a footnote that it will reach the merits of these issues "in an abundance of caution." *Order* at 29 n.23. However, the fact that the court even contemplates enforcing a "procedural bar" that involves claims that could not possibly have been raised on direct appeal demonstrates that the court misapprehends the law. There is no way an issue of ineffective assistance of counsel *could* have

the Court does. *See, e.g., Order* at 36 ("to the extent these claims are not procedurally barred, the Petitioner has not shown that counsel's performance was deficient. . . .").

In addition to not discussing the right to testify issue in the context of the IAC claim, the District Court does not discuss the judicial misconduct question under this heading. It is dealt with elsewhere in the *Order*, at 44-49. However, there is a clear issue of trial counsel's mishandling of the judicial recusal question, and this must be considered along with the totality of the IAC claim.

Beyond this, some of the state court decisions ratified by the District Court are quite astonishing. For example, we are told that it is acceptable for a trial attorney to fail to raise an issue involving the suppression of a confession, and instead argue the point to the jury. Counsel, who failed to file *one* written motion prior to a capital trial, testified: "Petitioner's trial attorney explicitly testified that 'I did not conclude that there was not a legal basis for not filing a motion to suppress. I decided that I would not file a motion to suppress, that I would argue the point to the jury. . . . It was a tactical decision made by me." *Order* at 33. This—like the failure to file a motion to suppress identification, *id.*—is simply absurd. If counsel files such a motion prior to trial, and loses it, counsel can still urge the issues before the jury. But if counsel prevails prior to the trial, the evidence—here, a statement argued at length by the prosecution, and critical identifications—would never have been introduced against his client.

On the issue of the extremely damaging *Caribbean Echo* articles, the District Court deferred to the state court ruling

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been raised on direct appeal, since there was no evidence in the record concerning why counsel may or may not have acted, and certainly no evidence of the suppressed material that should have informed counsel's decision. As mentioned previously, the recent decision of *Massaro v. United States*, 538 U.S. 500 (2003), is directly on point.

that the articles were admissible to show motive—a ruling purportedly made on direct appeal and post-conviction relief *Order* at 33-34. The state court did so rule on direct appeal, but this was before all of the suppressed evidence came to light concerning the falsity of each article. On post-conviction relief the state argued, and the state court accepted that the issue was *res judicata*. Of course, it could not be, since the suppressed evidence had not been known at the time of the direct appeal.

Even had it accepted that this procedural default was fully and fairly applied,[16] the District Court should at least have indulged in a cause and prejudice analysis to determine whether the state courts would reasonably have excluded the articles as more prejudicial than probative, had the facts not been suppressed. The District Court should have gone on to determine whether trial counsel should have vigorously investigated and challenged the accuracy of the articles, even if they were admitted, instead of merely letting the prosecution argue that the articles were the most important evidence in the case. None of this was done in the District Court opinion.

The District Court dismisses the claim that trial counsel should have consulted an array of experts in the same manner trial counsel did—by simply choosing not to explore it. *Order* at 36-37. Yet, while Appellant has never been permitted access to these experts to prove his point, *see Section I*,[17] no

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[16] Which it should not have. "[S]tate procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review." *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *see also Hathorn v. Lovorn*, 457 U.S. 255 (1962).

[17] Of course it is true that Petitioner has not presented the evidence of these experts, *Order at 37*, since he has never been allowed the funds. The issue presented to the Court is not "the mere possibility" that the experts might have helped his case. *Id., n.32*. Rather, he has made a detailed request for funding showing how the experts almost certainly will help his case. This goes to prove the prejudice stemming from the District Court's misapplication of the law with respect to expert and investigative funding.

strategic decision can be made without at least determining what the alternative is. It is difficult to see how a "strategy" of "discrediting . . . witnesses put on by the prosecution" would be incompatible with retaining experts who would help discredit those witnesses, For example, the crime scene reconstruction expert would prove that Butler's story was inconsistent with the physical evidence, and so on.[18]

Thus, Appellant respectfully suggests that a COA should be granted on the IAC claim as well.

V. WHETHER A COA SHOULD ISSUE WITH RESPECT TO APPELLANT'S CLAIM THAT A CAPITAL TRIAL SHOULD NOT BE RUN BY A JUDGE WHO IS SIMULTANEOUSLY ENGAGED IN TAKING BRIBES

Appellant will not rehash in detail the sordid history of judicial misconduct in this case—a history that implicated all three of the judges who first sat on his case. Suffice it to say here that the first judge was taking bribes (and solicited a bribe in Appellant's case); the second judge requested the State, *ex parte*, to write an order sentencing Appellant to death before the judicial sentencing procedure had even begun; and the third judge solicited from the State, again *ex parte*, an order denying the petition for post-conviction relief.

For purposes of the COA, the clearest issue is the District Court's very narrow interpretation of *Bracy v. Gramley*, 520 U.S. 899 (1997). In *Bracy*, the Supreme Court held that dis-

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[18] On the issue of impeaching Neville Butler, in an effort to support the notion that Eric Hendon did an adequate job, the District Court indicates that the jury "acquitted this defendant on each and every count where the State had named Neville Butler as the victim of a crime." *Order at 35*. With all due respect, Petitioner is not clear where the District Court comes up with this. In fact, the kidnapping charge where Butler was a purported victim was dismissed by the prosecution prior to trial—when the prosecution learned that Butler had lied about various issues in his first statement.

covery should ' . ' been allowed in a case where there was no allegation th ie judge had solicited a bribe in the petitioner's case, but there was some chance that he had engaged in "compensatory bias" against the petitioner to cover up fixing other cases for bribes.

As one might hope, there have not been many cases of judicial bribery since *Bracy*. Various interpretations might. be placed on *Bracy* by reasonable jurists. The interpretation placed on the case by the District Court here is, with all due respect, unduly restrictive, and certainly reasonable jurists could differ with the District Court's approach.

In this case, there is evidence of an actual bribery attempt in Appellant's case, and evidence of at least sonic direct bias against Appellant. Surely, this is a stronger case for a due process violation than *Bracy* itself? Yet the District Court distinguishes this case from *Bracy* because in *Bracy* the "judge had presided over the entire trial, and the potential basis for his bias was riot revealed until years later." *Order at 48.*

How does this make all the difference? Here, Judge Gross presided over all the pre-trial matters, over all of jury selection, and half of the trial, *after* having Appellant had rejected the solicited bribe. Thus, instead of compensatory bias, discovery would help Appellant prove actual, direct bias. Here, while he knew the judge was being taken away in handcuffs, trial counsel did not make the link at the time the judge was arrested that this was somehow linked to the earlier allegation made by his client, or that the judge could have been showing bias because his advance had been spurned. Here, the defense did not know that there was a memo in the files of the prosecution concerning the bribery, attempt. Here, the defense did not know that the FDLE tape of Judge Gross discussing bribes with lawyer Harvey Swickle included a reference to Appellant's on-going trial. In other words, Appellant's coun-

sel made his "strategic decision" to advise Appellant against a mistrial without knowing most of the operative facts.

Could it really be said that such a decision was reasonable, if discovery proved (as *Bracy* suggests it might) that the judge actively biased against Appellant? All Appellant asked of the District Court, preliminarily at least, was for the same discovery mandated in *Bracy* to delve into what was known by the FDLE and others concerning Judge Gross' behavior in the months and days leading up to Appellant's trial. Contrary to the District Court's opinion, this might very well alter the balance even of trial counsel's advice to his client, and certainly render counsel's advice unreasonable.

This is the question with respect to the COA: Could reasonable jurists differ in their interpretation of the scope of Bracy? Clearly they could. A COA should therefore be granted with respect to this issue.

VI. WHETHER REASONABLE JURISTS COULD DIFFER AS TO WHETHER "BEING INNNOCENT" STATES A CLAIM FOR RELIEF UNDER THE UNITED STATES CONSTITUTION?

With regard to Appellant's claim of innocence, the District Court rules effectively that 'innocence without more' is not a cognizable legal claim:

> Nonetheless, although Petitioner vigorously resists clear legal precedent, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). . .

Order at 49-50.

To begin with, the District Court entirely misses the point of its own citation: Much of the newly discovered evidence is

directly linked to a constitutional error, be it ineffective assistance of counsel, *Brady*, *Giglio* or one of the other issues discussed above. Therefore, this case fits squarely within the parameters of *Schlup v. Delo*, 513 U.S. 298 (1995),[19] where the Court held that claims of innocence that are offered as "cause" to excuse the procedural default of a constitutional violation require no more than proof that the errors have "probably resulted" in conviction of an innocent person.[20] Thus a COA should issue on this question.

However, there are also strong arguments for the issuance of a COA on the substantive claim of innocence. Again, it must be recalled, the standard is whether reasonable jurists can differ with the narrow interpretation of *Herrera* offered by the District Court. *Herrera*, of course, was a plurality decision, and it is not only Appellant who "vigorously resists" the notion that innocence (the most significant issue in any judicial system) must surely be relevant to whether someone must spend the rest of his life in prison: the *Herrera* plurality is one of the most-criticized opinions in U.S. Supreme Court history.

Even the *Herrera* court accepted that "[t]he central purpose of any system of criminal justice is to convict the guilty and *free the innocent*." *Id.* at 398 (emphasis supplied). Herrera itself holds open the possibility that newly discovered evidence may be grounds for habeas relief. *Herrera*, 506 U.S. at 417; *Clayton v. Gibson*, 199 F.3d 1162, 1179-80 (10th Cir. 1999). The narrow reading of the decision adopted by the

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[19] Thus, each time the District Court discusses "procedural bar" in the *Order*, the District Court should have discussed whether Petitioner's claim of factual innocence provided cause for the default. The District Court never mentions this once.

[20] Indeed, Appellant respectfully suggests that the standard enunciated by the District Court (whether "this evidence would establish by a preponderance of the evidence that no reasonably juror would have convicted Petitioner") is also erroneous in this context.

District Court has been criticized in law review articles. *See, e.g.*, Findley, *Learning from our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. W.L. Rev. 333, 338 (2002) ("Correcting the criminal justice system is not a defense cause, but a system-wide cause. The goal is not just to acquit the innocent, but also to identify and convict the guilty. All have a stake in this enterprise."). And, a number of lower courts have recognized that a substantive claim of innocence must be recognized the tide in the United States runs strongly in favor of vindicating the rights of the innocent. *See, e.g., People v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996); *Summerville v. Warden, State Prison*, 641 A.2d 1356 (Conn. 1994); *Miller v. Commissioner of Corrections*, 700 A.2d 1108, 1134-40, 242 Conn. 745 (1997); *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Ct. Crim. App 1996).

Clearly, then, reasonable jurists both can and do differ on this point. Thus, a COA should issue on this point.

Indeed, even if one were to pass over the broader issue of innocence as a substantive claim, the District Court recites the case so as to raise a string of extremely significant legal issues, each of which would provoke debate among reasonable jurists, For example, the District Court holds that newly-discovered evidence of an alibi cannot be considered as evidence of innocence because of a decision made at trial fifteen years before not to present the alibi witnesses who were then known. *Order at 51*. There is no case Appellant has been able to find that ratifies this line of reasoning.

The District Court posits a rule that "recantation by a witness does not, in itself, state a ground for habeas relief" *Order at 50-51*, citing *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir.). Whether this is the case or not, surely recantations and inconsistent stories by critical witnesses must be considered in the context of an actual innocence claim. Neither is it clear that evidence that is inadmissible at trial, *Order at 50*, should necessarily be excluded from the assessment of actual inno-

cence in the post-conviction context. For example, Appellant himself passed a polygraph test regarding his innocence. While this may have been inadmissible at trial, surely reasonable jurists can debate whether this is one element to be considered in assessing whether Appellant is actually guilty.[21]

All in all, then, a COA should be granted on this issue as well.

VII. WHETHER A FEDERAL DISTRICT COURT CAN RULE THAT REASONABLE JURISTS COULD DIFFER ON THREE FACETS OF THE *BRADY* CLAIM YET DENY THAT THE SAME JURISTS COULD DIFFER ON THE CUMULATIVE ERROR CLAIM

On the cumulative error claim, there are two ways in which the District Court should, with all due respect, find itself bound to grant a COA. First, while "the Court has found no single error that rises to the level of a constitutional violation," *Order at 58*, the Court has found three potential errors (with various subcategories) that merit a COA, suggesting that reasonable jurists can differ on these issues. Given this, then logic surely dictates that reasonable jurists can differ as to whether the aggregation of these three errors would merit relief at the same time.

The second facet of this claim that merits a COA is the scope of cumulative error review in federal habeas corpus. The District Court cites to a Fifth Circuit case for the proposition that "for cumulative errors in a state trial to state a ground for relief, the federal court must also find 'the individual errors involved issues of constitutional dimension rather

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[21] The District Court also appears to violate the clear rule in this Circuit that in assessing the validity of the *prima facie* case, the court must accept as true the reasonable allegations in the pleadings of the petitioner. *In re Boshears*, 110 F.3d 1538 (11th Cir. 1997) ("we must identify 'the facts underlying the [applicant's) claim' and accept them as true for purposes of evaluating the application.").

than mere violations of state law' and that 'the errors were not procedurally defaulted for habeas purposes.' *Order at 58*, citing *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995).

The question is not so simple. The issue of "cumulative error" is one of the most contentious in current case law, and the proper standard of review is clearly open to vigorous debate among jurists of reason. The Sixth Circuit seems to espouse the broadest approach to cumulative review, one that is clearly inconsistent with the District Court opinion in this case. In *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983), the Sixth Circuit granted relief where six pieces of evidence were admitted, each "marginally relevant for] irrelevant," but none of which individually violated the Constitution. *Id.* at 968. However, the overall effect was to deny the accused "fundamental fairness." *Id.*; *see also Lundy v. Campbell*, 888 F.2d 467, 481 (6th Cir. 1989), *cert. denied*, 495 U. S. 950 (1990).

The Ninth Circuit has adopted a hybrid variation of the Sixth Circuit approach. In *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1363 (1993), the Court found that counsel had provided inadequate performance, but did not specifically consider prejudice as it related to ineffectiveness. Instead, the Court looked to all the other alleged errors (of various dimension) in the trial, and found that the trial had been fundamentally unfair overall. *Id.* at 621-22. Thus, it could be said that there was no actual error of constitutional magnitude, standing alone.[22]

The Tenth Circuit has taken a bifurcated approach, ruling that "a cumulative-error analysis aggregates only *actual errors*

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[22] *Mak* is conceptually important since the case equates the analysis of "fundamental fairness" in a habeas petition with the "totality of the circumstances" approach in ineffectiveness claims. *See Mak*, 970 F.2d at 622 (ineffectiveness claims provide the parallel proposition that "a court may find unfairness – and thus prejudice – from the totality of counsel's errors and omissions").

to determine their cumulative effect." *United States v. Tome*, 3 F.3d 342, 353 (10th Cir. 1993) (emphasis in original). On the other hand, the courts cannot look solely to the errors to assess the impact of those errors, for "courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, *but only when actual error has occurred.* Thus the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." *United States v. Tome*, 3 F.3d at 353 (emphasis supplied; citation omitted).

These and other cases[23] demonstrate that this issue is a hotly debated one. By definition, then, it is one where a COA should issue.

CONCLUSION

WHEREFORE Appellant respectfully moves that a COA be issued with respect to each of the issues above.

Respectfully submitted.

Counsel For Krishna Maharaj

/s/ Clive A. Stafford Smith

BENEDICT P. KUEHNE
SALE & KUEHNE
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, Fla. 33131-2154
(305) 789-5989

CLIVE A. STAFFORD SMITH
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

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[23] The Eighth Circuit has altogether "reject[ed] cumulative error as a basis for habeas relief. . . ." *Wharton-El v. Nix*, 38 F.3d 372, 375 (8th Cir. 1994).

Exhibit A PARISH OF ORLEANS
STATE OF LOUISIANA
AFFIDAVIT OF JOSEPH HINGSTON

COMES NOW, JOSEPH HINGSTON, on this 28th day of September, 2004, under penalty of perjury, and states as follows:

I am an investigator in New Orleans, Louisiana. I recently undertook some investigation on behalf of Krishna Maharaj, as it relates to his federal habeas corpus. This investigation had been needed for a long time, but we had no funds to perform it. Finally, we were promised funding from a source in the United Kingdom, so I was able to do the travel. I am still far from being able to complete all the investigation tasks that are needed in Mr. Maharaj's case, but at least I was able to obtain the information identified below.

I went to the Bahamas and interviewed Frederick Nigel Bowe, the lawyer who was convicted as part of a drug conspiracy, and who spent some years in the U.S. federal penitentiary system. Bowe admitted knowing Adam Hosein before the murder of the Moo-Youngs. He confirmed that the address of his office was Fredericks House in Nassau. Through other investigation, we firmly establish that this was the business address of the Moo Youngs' illegitimate business, Cargil International—Bahamas. This gives further credence to the drug "triangle" that existed between Bowe, the Moo-Youngs and Hosein.

I went to Jamaica and interviewed Tino Geddes. Geddes confessed to me that then-Assistant State Attorney John Kastrenakes had used his influence to help him in various ways. For example, Kastrenakes helped him avoid losing his license after he was arrested for DUI (Driving Under the Influence) before the trial of Mr. Maharaj. Geddes admitted that he had never told this to anyone involved in the defense.

Geddes also told me stories about his close links to the prosecutors that would have been devastating to the prosecu-

tion's case against Mr. Maharaj. For example, Geddes told me that they went carousing around Kingston together when the prosecutors came to visit him there, and he took them to an exotic lap-dancing club. It would have been very powerful evidence that the prosecutors were "in bed" with Geddes to show that they were partying with him in the strip clubs of Jamaica, having naked women straddle them all through the evening.

Geddes' version of the story was markedly inconsistent with his trial version. For example, Geddes says that he changed his story because Kris Maharaj was pointing the finger at him and suggesting he was the person who committed the murders in addition to being different from his trial testimony, this is an obvious confabulation, since Mr. Maharaj would hardly have been pointing fingers at one of his alibi witnesses.

In terms of Geddes' false story that Mr. Maharaj concocted the alibi, Geddes has now changed his tune. He now states that Mr. Maharaj asked him to be an alibi witness while Mr. Maharaj was sitting in the police car outside Denny's. With police standing all around him, this would have been impossible, and it conflicts with Geddes' other testimony, illustrating his story to have been false in the first place.

Geddes came up with another ridiculous story concerning how, prior to the murders, he acted as a middleman for Mr. Maharaj, who wanted a hit taken out on Derrick Moo Young. Geddes claims he secured help from Jim Brown, a "yardie" from Jamaica who was "General" of the notorious Shower Posse. Geddes' negotiations allegedly fell through. While this story is false, it would have been extremely important in impeaching Geddes, since the story makes Geddes a party to a conspiracy to commit murder, and means that he would have required even more assistance from the State's Attorney—he could have been charged with the offense himself.

I went to Trinidad, but due to continued financial constraints, my investigative trip there was hurried. I believe there was significant other information that I could have developed to prove Hosein's involvement in this offense. However, in an interview with the wife of Dr. Derek Jhagroo, Nadrin Jhagroo, she confided that Adam Hosein had confessed to her husband that he (Hosein) had killed the Moo-Youngs and that Kris Maharaj was innocent- Adam Hosein divulged gruesome circumstances of the murders to Dr. Jhagroo. Mrs. Jhagroo had no motive to lie. Indeed, she was clearly frightened by our conversation and expressed concern for her own safety because she had disclosed this to me.

I also later learned that another witness, George Abchal, could identify Hosein as the killer. Abchal said that a few days before the murder, the Moo Youngs had denied Hosein a large quantity of cocaine on tick because his credit was poor. On the night of the murders, Hosein told Abchal that he had: "*got rid of the problem.*"

In an interview with Prince Ellis, he shed light on the drug dealings of Eddie Dames. Ellis spoke at length about his role and Dames's shady dealings. Among other things, Ellis said that Eddie Dames regularly visited South American countries involved in the drug conspiracy that Mr. Maharaj has been able to demonstrate. He also said that Eddie was suspended from being an air traffic controller as they suspected him to be using his position to commit crimes, such as drug importation.

The foregoing is a true and accurate account of what I know about this matter, and does not exhaust the sum of my knowledge.

Sworn, under penalty of perjury (No Notary Public available).

/s/ Joseph Hingston
JOSEPH HINGSTON
Date: 09/28/2004

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov. 22, 2004]

No. 04-14669-B

KRISHNA MAHARAJ,
Petitioner-Appellant,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
JAMES V. CROSBY, ATTORNEY GENERAL OF FLORIDA,
CHARLIE CRIST,
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability, construed as a motion to expand the certificate of appealability, is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appellant's "Motion to Suspend Br[illegible]ng Schedule Pending Outcome of Motion for Certificate of Appealability" and "Supplement to Motion to Suspend Briefing Schedule Pending Outcome of Motion for Certificate of Appealability" are DENIED. Appellant may proceed regarding those issues on which the district court already has [illegible]ed a certificate of appealability.

/s/ Lanier Anderson
LANIER ANDERSON
UNITED STATES CIRCUIT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Sept. 15, 2004]

Case No. 02-22240-CIV-HUCK/TURNOFF

KRISHNA MAHARAJ,
Petitioner,

v.

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,
ROBERT A. BUTTERWORTH, Florida Attorney General,
Respondents.

ORDER GRANTING
CERTIFICATE OF APPEALABILITY

THIS MATTER is before the Court upon Petitioner's Notice of Appeal [DE # 54], filed September 8, 2004. The notice is treated as a motion for a Certificate of Appealability.

Pursuant to 28 U.S.C. § 2253(c), an appeal may not be taken from a final order in a *habeas corpus* proceeding unless a Certificate of Appealability is issued. The certificate must contain a finding that the applicant has made a substantial showing of the denial of a constitutional right and must indicate which specific issue or issues satisfy the required showing. It is

ORDERED that the Motion is GRANTED IN PART and DENIED IN PART. For the reasons stated in its Order on Report and Recommendation ("Order on R&R") dated August 30, 2004, the Court grants the Motion as to five issues for which a Certificate of Appealability shall issue. The Court

denies a Certificate of Appealability on all other grounds raised in the Petition.[1] Accordingly, the following issues are certified for appeal to the Eleventh Circuit:

(1) Whether the State prejudicially suppressed discoverable *Brady* material by not disclosing the report of Neville Butler's polygraph examination, *see* Order on R&R at 17-19, 22;

(2) Whether the State prejudicially suppressed discoverable *Brady* material by not allowing access to or disclosing the contents of the victims' briefcase, *see* Order on R&R at 19-21, 22;

(3) Whether the State prejudicially suppressed discoverable *Brady* material by not disclosing any knowledge of or information in its control regarding the victims' life insurance *see* Order on R&R at 21-22;

(4) Whether Petitioner's trial counsel was constitutionally ineffective for not investigating the allegations of pending charges and outstanding warrants against the Petitioner in England before advising his client not to testify during the guilt phase of his criminal trial, *see* Order on R&R at 42-44; and

(5) Whether, in light of recent opinions of the International Court of Justice, any federal court has jurisdiction to

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[1] After reviewing the very lengthy habeas Petition, memoranda, and other supporting documents, this Court identified in its Order on R&R the issues for which it would allow a certificate of appealability were the Petitioner to appeal. See Order on R&R at 59 n.49. However, Petitioner represents in his Notice of Appeal that he intends to seek review of other issues. While the Court recognizes that, under Federal Rule of Appellate Procedure 22(b) and 11th Circuit Rule 22-1(d), a petitioner may request a single circuit judge to issue the certificate on issues denied by the district judge, the issues identified in this Order are the only ones for which this Court finds the Petitioner has made a substantial showing of the denial of a constitutional right.

determine, on the merits, whether the State of Florida violated the Petitioner's right to consular notification despite the Florida Supreme Court's finding that Petitioner had procedurally defaulted this claim by failing to raise it on direct appeal. *See* Order on R&R at 52-58.

DONE AND ORDERED in Miami, Florida on this 15th day of September, 2004.

/s/ Paul C. Huck
PAUL C. HUCK
United States District Judge

Copies furnished to:
Deborah Ferguson-Christian, Operations Supervisor, Appeals
All Counsel of Record

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Aug. 30, 2004]

Case No. 02-22240-HUCK/TURNOFF

KRISHNA MAHARAJ,
Petitioner,

v.

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Florida Attorney General,
Respondents.

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the Report and Recommendation ("R&R") of Magistrate Judge William C. Turnoff [DE # 33]. Section 636(b)(1) of the Federal Magistrate Act requires this Court to make a *de novo* determination of those parts of the Magistrate Judge's R&R to which objection is made. 28 U.S.C. § 636(b)(1); *United States v. Raddatz*, 447 U.S. 667, 673 (1980); *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512-13 (11th Cir. 1990). The Petitioner timely objected to essentially the entire R&R, as well as to items he claims the Magistrate Judge did not address. Accordingly, this Court has conducted a *de novo* review of the entire Petition. Upon consideration, the Court finds that Petitioner is not entitled to habeas relief on any of the twelve grounds stated in the Petition. On the expectation that an appeal will be filed, the Court has also noted those issues upon which a Certificate of Appealability will be granted.

Factual Background

The facts of this case as found by the Florida Supreme Court on direct appeal have been detailed in reported state decisions, so the Court will only provide a brief summary of those facts here, further elaborating on other relevant facts in the context of Petitioner's particular challenges. A more thorough recitation of these facts can be found in *Maharaj v. State*, 778 So.2d 944, 947-50 (Fla. 2000) ("*Maharaj IV*").

Essentially, Petitioner Krishna Maharaj was convicted on October 21, 1987, of two counts of first degree murder, two counts of kidnaping, and unlawful possession of a firearm while engaged in a criminal offense, for the shooting deaths of Derrick and Duane Moo Young at the Dupont Plaza Hotel in Miami, Florida, on October 16, 1986. According to the Florida Supreme Court, the murders occurred as a result of a dispute between Maharaj and Derrick Moo Young. Maharaj, a British national who was born in Trinidad, owned and ran a newspaper directed to the West Indian community in Southern Florida called *The Caribbean Times*. The evidence showed that a rival newspaper owned by Eslee Carberry, *The Caribbean Echo*, had published unflattering articles about Derrick Moo Young accusing him of theft and against Maharaj for allegedly illegally taking money out of Trinidad and for allegedly forging a $23,000 check that was the basis of a lawsuit by Derrick Moo Young against Maharaj. Maharaj, however, claimed that Derrick Moo Young was actually committing fraud and extortion against him, including extorting $160,000 from Maharaj's relatives in Trinidad. Neville Butler, the primary witness for the State, had worked at the *Echo* before starting to write for Maharaj at *The Caribbean Times* in September 1986. He testified at trial that Maharaj had asked him to help lure Derrick Moo Young to a meeting, without revealing that Maharaj would be there, so that Maharaj could extract a confession related to this fraud

and extortion and so that Maharaj could force Derrick Moo Young to repay him.

Butler reported that he arranged a meeting for October 16, 1986, using the pretext of setting up a business meeting between Derrick Moo Young and two Bahamian individuals, Eddie Dames and Prince Ellis, in Dames' suite at the Dupont Plaza Hotel. Butler testified that when Derrick Moo Young arrived at Dames' suite, he unexpectedly also brought his son, Duane Moo Young. After the Moo Youngs had entered the room, Maharaj emerged from behind a door with a gun and a pillow. An argument then broke out over the money owed, and Maharaj shot Derrick Moo Young in the leg. Maharaj then allegedly asked Butler to tie up Duane and Derrick Moo Young, but Derrick lunged at Maharaj, and Maharaj shot him three or four times. While Maharaj turned his attention to Duane, questioning him about the money, Derrick crawled out the door into the hallway before Maharaj reportedly shot him again and pulled him back into the room. Butler testified that Duane got loose shortly thereafter and lunged at Maharaj, but Butler restrained him. Maharaj then took Duane upstairs to question him further, after which Butler heard a single shot. Maharaj came back downstairs, and Butler and he left the room. Butler testified that he and Maharaj waited in the car in front of the hotel for three hours after the murders for Dames to return. Butler stated that he met with Dames and Ellis later that day and told them what had happened. They encouraged him to call the police. Reportedly, Maharaj called Butler later that day asking him to meet at Denny's to get their story straight. Butler called a police detective, Lieutenant Buhrmaster, who accompanied him to Denny's and arrested Maharaj.

Other witnesses testified as to motive and prior acts by Maharaj that were consistent with his committing these murders. Tino Geddes, a journalist at the *Echo*, and Carberry, the owner of the *Echo*, testified that Maharaj had paid Car-

berry to publish a couple articles about Derrick Moo Young and had wanted to write a weekly article about him. Maharaj reportedly became hostile toward Carberry after Carberry published favorable stories that told Derrick Moo Young's side of the story and after Carberry, who did his own investigation, published some unfavorable articles about Maharaj, accusing him of illegal activities. Geddes testified that Maharaj had purchased some exotic weapons and camouflage and had tried to harm Carberry on several occasions. Geddes stated that Maharaj had, on one occassion, met Geddes at the DuPont Plaza Hotel with a handgun and asked Geddes to lure Carberry and Derrick Moo Young to the hotel room, but Geddes was unable to get either to come.

In addition, the State presented corroborating evidence, including testimony from the maid who had cleaned the room at the DuPont Plaza Hotel. She testified that the room had not been used the prior evening when she cleaned it that morning. At about 12:15 p.m., when she attempted to enter again, she found the room locked from the inside. She came back ten minutes later with a security guard and, at that time, the "Do Not Disturb" sign had been hung outside on the doorknob, but the master key worked, and she found the two bodies inside. Additionally, the State presented a fingerprint expert who testified that Maharaj's fingerprints were found in about twelve places inside the room, including on the "Do Not Disturb" sign. A firearms expert also testified that the eight bullets fired were from a Smith & Wesson model 39, nine-millimeter semiautomatic pistol with a serial number under 270,000, and the State presented evidence that Maharaj owned a Smith & Wesson nine-millimeter pistol with the serial number A235464. The medical examiner also testified that the gunshot trajectory and other evidence regarding Duane Moo Young was consistent with his being shot at close range in the head while kneeling or sitting with his head facing the wall of the room.

Shortly after Maharaj's trial began, the chief judge of the criminal division announced that the judge who had been presiding over the trial would not be able to continue, as he had been arrested for accepting bribes. Maharaj's attorney indicated he would not move for a mistrial, to which Maharaj agreed upon questioning by the new trial judge. The new judge stated he had read the testimony of the trial to that point and proceeded. At the close of the prosecution's case, the defense did not present any witnesses, and Maharaj did not testify on his own behalf, after which the jury found Maharaj guilty on all offenses charged except armed burglary and aggravated assault. After an advisory jury heard additional evidence in the penalty phase, it voted six to six in favor of life imprisonment for the murder of Derrick Moo Young and seven to five in favor of the death penalty for Duane Moo Young. On December 1, 1987, Maharaj was sentenced to death for the murder of Duane and to life imprisonment for the murder of Derrick Moo Young, as well as receiving shorter consecutive sentences for the other counts.

Maharaj appealed his conviction to the Florida Supreme Court on December 9, 1987, and, after substantial indigency proceedings, was declared indigent on December 8, 1988. In December 1989, Maharaj asked the Florida Supreme Court to relinquish jurisdiction so that he could file a writ of error *coram nobis* with the trial court. The Florida Supreme Court granted that motion, relinquishing jurisdiction for ninety days and instructing Maharaj to file his writ within thirty days. Maharaj did not file the writ within thirty days, moving instead for appointment of a public defender, which was not permitted in capital post-conviction cases. After the ninety days had elapsed without any *coram nobis* proceedings being initiated, the Florida Supreme Court resumed jurisdiction, denying Maharaj's five grounds for appeal on the merits, as procedurally barred, or both. *See Maharaj v. State*, 597 So.2d 786 (1992) ("*Maharaj II*"). The United States Supreme Court denied certiorari on January 11, 1993.

Maharaj then initiated post-conviction proceedings on seven grounds, but his petition was summarily denied by Judge Glick on November 21, 1994. Judge Glick had been a supervisor at the State's Attorney's Office at the time of Maharaj's trial and told the parties he would probably not be able to handle the evidentiary hearing if one was necessary. On appeal, the Florida Supreme Court found that Judge Glick should have recused himself and then remanded the case for an evidentiary hearing on three issues which were not procedurally barred. *See Maharaj v. State*, 684 So.2d 726 (Fla. 1996) ("*Maharaj III*"). Maharaj sought funding to pursue his post-conviction claim, but was unsuccessful at securing funding from at least three sources. On September 8, 1997, Maharaj elected to proceed with the evidentiary hearing despite the trial court's offer to stay the proceedings until funding issues could be resolved. After a five-day evidentiary hearing, the state post-conviction court denied relief with respect to the convictions but ordered a new sentencing on the death sentence due to a finding that the sentencing judge had requested, *ex parte*, that the state prosecutors prepare a death sentence order before the advisory jury had returned its verdict. *See Maharaj v. State*, No. 86-30610, Order on Rule 3.850 Petition for Postconviction Relief (Fla. 11th Judicial Cir. Crim. Div. Nov. 12, 1997) ("*Maharaj PCR Order*"). Maharaj appealed the denial of relief on the convictions, but the State elected not to appeal the judge's decision to order a new sentencing proceeding. The Florida Supreme Court affirmed the post-conviction trial court's denial of relief on November 30, 2000. *See Maharaj v. State*, 778 So.2d 944 (Fla. 2000) ("*Maharaj IV*"). That court denied a rehearing on January 23, 2001. The United States Supreme Court denied certiorari on June 25, 2001. On March 18, 2002, upon resentencing, Maharaj was sentenced to life imprisonment on the count for which he had previously been given the death penalty.

Maharaj had also previously filed a premature federal habeas petition, which was dismissed without prejudice as premature by this Court, and that dismissal was affirmed by the Eleventh Circuit. On July 26, 2002, Petitioner filed this writ of habeas corpus under 28 U.S.C. § 2254, stating twelve grounds for relief in a 330 page petition. The State of Florida filed its fifty-two page response on May 7, 2003, to which Petitioner filed a 103 page Reply and Motion for Evidentiary Development on June 10, 2003. The Court granted leave for the United Kingdom to file an Amicus Brief, which was filed on November 5, 2003. On February 23, 2004, Magistrate Judge William C. Turnoff issued his R&R on this Petition. Petitioner filed 120 pages of objections on March 5, 2004. Due to the comprehensive nature of the Objections, the Court has reviewed the Petition, all related briefs and Objections, the R&R, the state court's decisions, the transcripts from Petitioner's criminal trial and his state post-conviction evidentiary hearing, and the evidentiary submissions filed as Petitioner's appendix. Upon careful consideration of this record, the Court finds as follows.

Analysis

As the State concedes, Petitioner has raised all of his federal habeas claims in prior state court proceedings and "the issues have been sufficiently exhausted to warrant consideration on a petition for federal habeas corpus." Accordingly, this Court has jurisdiction to consider each of the claims presented in the Petition. At the outset, the Court notes that, upon review of the Petition and related documents, it is persuaded that, were this case to be tried again today by current counsel and in the light of some new information that has been discovered since Petitioner's trial in 1987, the defense would have at its disposal more evidence and perhaps a better developed theory of defense than was presented in the original trial that led to his convictions. However, the Court does not believe that the outcome would be different and does

not find that the Petitioner has provided sufficient evidence to show actual innocence or to undermine the verdict of the jury.

Regardless, in order to be entitled to relief under the federal habeas corpus statute, 28 U.S.C. § 2254, a petitioner must do more than show the likelihood of a different result absent the alleged errors in underlying criminal proceedings. He must also show that the errors resulted from one or more violations of federal constitutional law. Moreover, because this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA),[1] the Court's review here is limited to a determination of whether the state court reasonably determined facts and reasonably applied federal law in denying the petition that was brought under Florida's Rule 3.850. The AEDPA amended the standards for review of state court decisions, providing that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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[1] The Supreme Court has made clear that the applicability of the AEDPA is governed solely by the filing date of a habeas petition, and since this petition, as well as the previous petition which was dismissed on the ground that it was filed prematurely, were filed several years after the effective date of that Act, its provisions clearly govern this Court's review of the present petition. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

In his Objections to the R&R, Petitioner repeatedly argues that the Magistrate Judge used the incorrect standard for assessing the various claims raised in his original petition. However, the real question should be whether the Florida trial court and Florida Supreme Court used the proper legal standards as developed by the United States Supreme Court or whether they reached unreasonable factual conclusions based on the evidence presented in the five-day post-conviction evidentiary hearing held from September 8, 1997, to September 15, 1997.[2] In addition, Petitioner makes the mistake of assuming that, just because certain claims in his 330 page, 1144 paragraph petition were not specifically addressed in the Florida state courts' decisions, the State's response to this petition, or the Magistrate Judge's R&R, these claims have not been given the proper amount of consideration required by law. The Eleventh Circuit has addressed the question of whether "[a] state court's summary, which is to say unexplicated, rejection of the federal constitutional issue qualifies as an adjudication under § 2254(d) so that it is entitled to deference[,]' and answered it as follows, 'all that is required [to accord the state court's decision deference] is a rejection of the claim on the merits, not an explanation." *Peoples v. Campbell*, __ F.3d __, 17 Fla. L. Weekly Fed. C853, C858 (11th Cir. 2004) (quoting *Wright v. Sec'y for the Dep't of Corr.*, 278 F.3d 1245 (11th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003)). Thus, a deferential ap-

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[2] Although Petitioner relies on pre-AEDPA case law to argue that state conclusions of law are not entitled to a presumption of correctness, the AEDPA clearly mandates that federal courts must afford substantial deference to state court's legal findings and only overrule them if the state court determinations were made contrary to or through an *unreasonable* application of clearly established United States Supreme Court precedent. *See* 28 U.S.C. § 2254(d). Thus, even if this Court believes that a state court ruling is not contrary to established law, but yet is an erroneous application of it, this Court may not overrule the state court unless that application was unreasonable.

proach to the state court findings, even where a detailed explanation was not given, must govern this Court's review of Petitioner's lengthy Petition. Keeping in mind the obligation to afford the state court findings a presumption of correctness, this Court will address Petitioner's individual claims as to each ground for relief.

A. Denial of Funds, Public Records Disclosure, and Motion for Evidentiary Hearing

Petitioner's first ground for habeas relief is that he "was denied the resources necessary to present his case in state court and must therefore be permitted both the resources and a hearing at which to present his case before this Court." Petitioner argues that this Court should not rely on decisions in the state court collateral proceedings because the Petitioner was never afforded a "full and fair" hearing, largely due to the fact that he was unable to procure any funding to pay for further investigation and experts and to present witnesses at the state 3.850 hearing. For this reason, Petitioner claims this Court must conduct its own evidentiary hearing and should grant the Petitioner additional funding for experts and investigators.

Petitioner has provided an extensive description of the additional investigative avenues he could pursue and expert witnesses he could contract to produce additional evidence if sufficient funding were provided. He notes that lack of funds prevented him from presenting testimony from several witnesses at the post-conviction evidentiary hearing, including the State's main three witnesses, Neville Butler, Tino Geddes, and Eslee Carberry, who were living in other countries which Petitioner's counsel could not afford to visit. He further argues that the lack of funding prevented him from hiring experts to independently evaluate the evidence, particularly a fingerprint expert, an identification expert, a crime scene reconstruction expert, a ballistics expert, a handwriting analysis expert, and a forensic accountant who could determine

whether the Moo Young's finances suggest that they were involved in fraudulent schemes or illegal money laundering. Petitioner's counsel has detailed, both in his memoranda and in *ex parte* filings, his efforts to obtain funding from state agencies. After several months of trying to obtain funding, and after the post-conviction proceedings had been continued on more than one occasion at the government's request, Petitioner was given the option of proceeding with the state post-conviction hearing or of continuing the case to see if additional money would become available the next month. Petitioner elected to go forward with the trial based on his belief that funding would not be forthcoming and due to his interest in an expeditious resolution of his state post-conviction claims.

Although unfortunate, this lack of funding in the state post-conviction hearing does not state a ground upon which the Court can grant any relief. Simply put, the decisions by the various state agencies and other organizations which, for whatever reason, were unable to fund Petitioner's defense does not constitute a constitutional violation which can state a federal habeas claim. Whether the State had a duty under its own statutes and rules to provide funding in collateral proceedings is a matter of state law, and the Florida Supreme Court fully evaluated this issue. That court ruled that Petitioner had not been deprived of a full and fair hearing before the state post-conviction court due to the lack of funds and found that the Petitioner had made a strategic decision to continue with the evidentiary hearing rather than wait to see if one of the possible sources of funding, the Capital Collateral Regional Counsel, could meet the funding request at a later date. Thus, to the extent that Florida had any requirement under its statutes and rules to provide funding for the Petitioner, its Supreme Court found that those laws were not violated with respect to this Petitioner, and this Court is not empowered to overturn its interpretation of its own procedural requirements. *See Estelle v. McGuire*, 502 U.S. 62, 67

(1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, while Petitioner claims in his Objections that this Court has discretion to order funding because the lack of state funding in the state proceeding denied him a full and fair hearing, Petitioner has pointed to no statute, case law, or other authority which would permit, much less require, this Court to provide funding for pursuit of this federal petition. In fact, although the AEDPA provides for counsel and resources for indigent federal petitioners in *capital* habeas cases, that statute does not provide for any discretionary or required funding for *non-capital* defendants. *See* 28 U.S.C. § 2261(b). Because Petitioner's death sentence was converted to a life term on resentencing, he is not eligible for the special habeas provisions that apply to capital cases. Thus, this Court cannot order either the Florida state government or the federal government to provide the funding he has requested.

Petitioner complains, as his twelfth ground for habeas relief, that the State of Florida has not complied with its obligation to provide public records related to the Petitioner under state disclosure laws. As the State correctly points out, its requirement to disclose documents under the Florida Public Records Act is purely a question of state law that does not state a constitutional issue which is redressable through a federal habeas action. The Court will not address the merits of Petitioner's claims regarding Florida's obligations under its own statutes. *See Estelle*, 502 U.S. at 67 n.2 ("[S]tate-law violations provide no basis for federal habeas relief").

Nonetheless, Petitioner insists that the lack of funding and incomplete disclosure of public records, if not grounds for federal habeas relief in themselves, are further evidence that he never received a full and fair hearing at the state level, and he argues that these facts should be taken into account in determining whether further evidentiary development is

warranted. "For a claim to be fully and fairly considered by the state courts, where there are facts in dispute, full and fair consideration requires consideration by the fact-finding court, and at least the availability of meaningful appellate review by a higher state court." *Tukes v. Dugger*, 911 F.2d 508, 513-14 (11th Cir. 1990). In this case, Petitioner was clearly afforded both opportunities, since a state court held an extensive evidentiary hearing and the Florida Supreme Court issued a lengthy opinion affirming the trial court's decision on the post-conviction petition. In arguing that, nonetheless, he should be allowed an evidentiary hearing in federal court, Petitioner again relies on pre-AEDPA precedent regarding his entitlement to such a proceeding.[3] Prior to the AEDPA, federal courts were to afford a presumption of correctness to state court collateral proceedings, but were required to hold their own evidentiary hearings even if the state court had conducted one if the petitioner could establish one of eight infirmities in the state court proceedings.[4] Under the AEDPA, all

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[3] For example, in his Objections to the R&R, Petitioner devotes nearly thirty pages to arguing why a federal evidentiary hearing must or should be held. However, despite numerous citations to case law, the Petitioner identifies very few cases that were decided under the AEDPA and its much more limiting standard for ordering a second evidentiary hearing when one has already been held during the state court post-conviction proceeding, and those post-AEDPA cases that he does cite do not require, but merely permit, an evidentiary hearing under certain limited circumstances, as discussed below. As the Supreme Court noted, Congress's intent in revising § 2254 was to "avoid unneeded evidentiary hearings in federal habeas corpus" proceedings and to recognize that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues" where a prisoner had a fair opportunity to present them in a state proceeding. *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000). Thus, Petitioner's continued reliance on cases employing the preAEDPA standards is misplaced.

[4] The eight exceptions included a showing that the fact finding procedures were not adequate to ensure a fair proceeding, that petitioner was denied a full, fair, and adequate hearing, that the material facts were not adequately developed in the state court proceedings, that the State failed

of these exceptions have been eliminated, and this Court must afford a presumption of correctness to the state court factual determinations unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). To the extent that the Petitioner "failed to develop the factual basis of a claim in the State court proceedings," a federal habeas court may not hold an evidentiary hearing unless one of the following exceptions applies:

> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2245(e)(2). This much higher standard gives federal courts very little room to afford a state prisoner who has been granted an evidentiary hearing in state collateral proceedings a second chance at one in federal court. *See Kelley v. Sec'y for Dep't of Corr.*, ___ F.3d, ___, 2004 WL 1637062, at *14(July 23, 2004) ("AEDPA expressly limits the extent to which hearings are permissible, not merely the extent to which they are required."). Even under AEDPA, federal habeas courts do have some discretion in determining whether a Petitioner has "failed to develop the factual basis" in state court to prevent a fundamental miscarriage of justice

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to appoint counsel for an indigent defendant, and that the petitioner was denied due process in the state proceedings. 28 U.S.C.A. § 2254(d) (West 1994).

or if the petitioner has diligently sought to develop the factual basis of his claim, yet been unable to do so due to some external impediment. *See Kelley*, 2004 WL 1637062, at *13 (even before the enactment of AEDPA, "it was settled in this circuit . . . that district courts lacked discretion to grant evidentiary hearings to develop facts that a habeas petitioner had failed to develop in state court, unless the petitioner established cause and prejudice or a miscarriage of justice."); *Williams v. Taylor*, 529 U.S. 420, 436-437 (2000); *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), *cert. denied*, 538 U.S. (2003); *see also Campbell v. Vaughn*, 209 F.3d 280, 286-87 (3d Cir. 2000) (holding a federal court could hold an evidentiary hearing where the fault for the failure to develop the facts lay with the state court, not with the petitioner). However, even in those instances, a court is not required, but is merely permitted, to hold an evidentiary hearing if the state court has held one. *Campbell*, 209 F.3d at 287 ("In exercising that discretion, courts focus on whether a new evidentiary hearing would have the potential to advance the petitioner's claim."); *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998) (denying an evidentiary hearing where petitioner had "failed to forecast any evidence beyond that already contained in the record" that would contribute to his cause).[5]

The Court recognizes that Petitioner has been diligent in attempting to develop the factual basis for at least most of the

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[5] Petitioner cites several cases, but no Eleventh Circuit or Supreme Court cases, which have held that a federal court must hold an evidentiary hearing under the pre-AEDPA standard enunciated in *Townsend v. Sain*, 372 U.S. 293 (1963), if the petitioner is not at fault for having failed to develop the facts in the state proceeding. *Townsend* essentially requires that a petitioner be afforded a full and fair hearing at the state post-conviction level. As discussed below, the Court finds that the week-long state evidentiary hearing did afford the petitioner a full and fair hearing, despite his claims of being hampered by lack of state funding and despite his objections to specific rulings by the state court during those proceedings.

claims related to this matter. Petitioner's counsel, who are essentially working pro bono, have obviously expended a great deal of effort, time, and money investigating their client's case by obtaining documents from a variety of sources, speaking to a number of witnesses, obtaining at least one expert opinion even without funding, and taking other steps to develop the evidentiary record. They also made extensive efforts to secure funding from the state court system in order to contract experts and pay for investigative expenses of tracking down and interviewing important witnesses both in this country and abroad. Thus, it appears that there may have been external forces which prevented Petitioner from fully developing the record in the state proceeding and it may, therefore, be within this Court's discretion to hold an evidentiary hearing. However, the state post-conviction hearing cannot be found inadequate given the Florida Supreme Court's findings related to the funding issues and the fact that Petitioner himself elected to go forward with the hearing on the basis of the evidence he had already amassed.[6]

Moreover, most, if not all, of the relevant evidence that Petitioner would produce at an evidentiary hearing before this Court was already made part of the record during the state evidentiary hearing or as part of the instant Petition. While

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[6] Although the Court is cognizant of the Petitioner's argument that he was faced with a Hobson's choice in deciding whether to obtain speedy resolution of his state post-conviction petition or wait for funding that may never come, the Petitioner's characterization of this as a constitutional issue is unavailing. The cases Petitioner cites prevent an individual from having to choose between one of two federal constitutional rights. In this case, neither of the rights Petitioner claims are protected by the U.S. Constitution. Specifically, there is neither a federally protected right to adequate funding in state post-conviction proceedings, nor is there a federally protected right to speedy post-conviction proceedings. Thus, the Petitioner's presentation of a "Hobson's choice" between these two "rights" does not create a federal constitutional violation.

Petitioner has alluded to a variety of additional facts he may be able to prove through witnesses who have not been contacted, investigations that have not been completed due to lack of funding, or experts who could not be contracted, Petitioner has made clear that this potentially new evidence will not be obtained absent an order granting additional resources to the Petitioner. Since the Court is aware of no law that would permit such relief, an evidentiary hearing would not result in the development of any additional evidence that is not in the record. *See Sibley v. Culliver*, ___ F.3d, ___, 2004 WL 1620831, at *8 (11th Cir. July 21, 2004) (stating that, based on the "paucity of evidence . . . . [n]othing in our opinion required that the district court grant [petitioner] either discovery or an evidentiary hearing"); *cf. Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("A petitioner is not entitled to an evidentiary hearing . . . when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible."); *Patterson v. Bartlett*, 56 Fed. Appx. 762, 764 (9th Cir. 2002) ("It is unlikely that an evidentiary hearing on the allegations contained in the affidavits would produce the sort of reliable evidence of actual innocence that [Supreme Court precedent] demands."), *cert. denied*, 538 U.S. 1062 (2003).

Further, the Petitioner has had a substantial amount of time since the evidentiary hearing on his state court petition, as well as since filing this and its predecessor petition, to obtain whatever state relief he could in order to ensure public disclosure of any documents not previously provided by state agencies.[7] Yet, Petitioner has not moved to supplement the evidentiary record nor has he suggested in recent filings that

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[7] The first federal petition, which was denied without prejudice as premature, was filed on July 12, 2001. The current Petition was filed on July 26, 2002. Petitioner's recent filings, filed in March of this year, give no indication that any new evidence has been discovered or public records disclosed in the three years since the filing of his first petition.

any new, relevant documents have been obtained since the evidentiary hearing in the Florida court. Since this Court cannot order disclosure of such public records and the Petitioner has apparently either not secured relief in that regard or has obtained additional documents but determined that none of them would bolster his habeas petition, no purpose would be served by further extending the time in which Petitioner may obtain these documents or by holding an evidentiary hearing to discuss any potential evidence that has not yet been, and likely never will be, obtained.[8] Accordingly, the Court finds that, even if it does have discretion to provide an additional evidentiary hearing, this case does not warrant one.

Petitioner also claims he is entitled to a new hearing because the state post-conviction court would not allow him to present particular witnesses or evidence at his evidentiary hearing, particularly noting that the post-conviction court allowed him to present only two alibi witnesses, and precluded him from presenting testimony from alibi witness George Bell because the trial lawyer at Petitioner's underlying trial had made the strategic decision to withdraw him from the defense's witness list.[9] However, "an alleged defect

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[8] Petitioner suggests that he should be given time to investigate any additional claims that might result from the disclosure of documents before proceeding with adjudication of the merits of the Petition. The Court denies this request for the reasons given above.

[9] It is not actually true that the post-conviction court limited Petitioner to just two alibi witnesses. In fact, although Petitioner had announced its intent to call a new alibi witness, Marianne Cook, during the evidentiary hearing, he withdrew her prior to any ruling by the trial court, after a deposition conducted by the State revealed unfavorable information about her attitude toward police, as well as a history of trouble with the law, including a drug conviction. Further, the post-conviction court did not allow George Bell to testify because he had been withdrawn from the witness list before trial due to concern about a prior drug-related arrest, and the court therefore found that his testimony in the post-conviction

in a collateral proceeding does not state a basis for habeas relief." *Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004); *see also Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987) (holding that the state court's failure to hold a hearing on a 3.850 motion did not state a basis for habeas relief because it went to "issues unrelated to the cause of petitioner's detention").[10] Therefore, the Court cannot consider whether any of these individual rulings were in error. Moreover, the Court finds that the cumulative effect of these few trial court rulings in a week-long proceeding did not prevent the Petitioner from developing the facts necessary to support his claim. The court permitted him to present all of the actual alibi witnesses he had intended to offer, and the other trial court rulings that he disputes were related to limited issues and were either based on relevancy, admissibility or cumulative evidence or were related to evidence that could have been developed through other means. Therefore, these rulings did not prevent Petitioner from receiving a full and fair hearing or from developing the facts necessary to support his state post-conviction claims. *Cf. Machin v. Wainwright*, 758 F.2d 1431, 1434 (11th Cir. 1985) (federal review of state evidentiary issues are "limited to determining whether [defendant's] trial was so unfair as to violate due process").[11]

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proceedings was barred. Moreover, according to Petitioner's criminal trial counsel, Bell was not truly an alibi witness because he would not have testified about where the Petitioner was at the time of the murders.

[10] Petitioner further complains about a handful of other rulings by the post-conviction trial court, including excluding a report by Detective Waldman, a suppressed statement regarding Eslee Carberry, and a note from the prosecutor that Buhrmaster should speak with the Florida Highway Patrol about "gun and money." He also challenges the state court's denial of a proffer by a defense lawyer who would have testified as an expert witness as to how Petitioner's case should have been tried and the state court's ruling limiting his post-conviction counsel's questioning of the prosecutor from the criminal case.

[11] Additionally, the Florida Supreme Court substantively evaluated the Petitioner's challenges to the post-conviction court's rulings at the evi-

B. *Brady* violations

A significant portion of Petitioner's claims focuses on his fourth ground for relief, the State's alleged *Brady* violations for failing to disclose evidence favorable to the defense. "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Kelley v. Sec'y for Dep't of Corr.*, ___ F.3d ___, 2004 WL 1637062, at *30 (11th Cir. July 23, 2004) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). In order to prevail on a *Brady* claim, a petitioner must demonstrate that (1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the prosecution suppressed the evidence, either willfully or inadvertently, and (3) the suppressed evidence was material such that prejudice ensued, meaning that a reasonable probability exists that its disclosure would have caused a different outcome at trial. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). "Of course, Brady and its progeny apply only to evidence possessed by the prosecution team, which includes both investigative and prosecutorial personnel." *Kelley*, 2004 WL 1637062, at *30.

Petitioner's Objections to the R&R focus largely on the Magistrate Judge's treatment of the *Brady* claims. In addressing these questions, Petitioner cites extensively from several recent cases, including one, *Banks v. Dretke*, 124 S.Ct. 1256 (2004), which was decided after the R&R was issued. However, his arguments, both in the original Petition and in his Objections, never fully acknowledge the limits of this

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dentiary hearing and found them to be without merit, concluding that "[w]hile a defendant is generally allowed great latitude in the presentation of evidence at postconviction hearings, the defendant is still bound by the rules of evidence regarding materiality and relevancy." *Maharaj IV*, 778 So. 2d at 959 n.13.

Court's jurisdiction over his federal habeas case. Although some of the cases cited by Petitioner on the *Brady* issues are recent, they were all decided under the pre-AEDPA standard because those petitions were filed prior to the effective date of that act. As a result, while the cases may be helpful for identifying the relevant law, their analysis cannot be directly applied to this case. As one of those decisions noted in applying the pre-AEDPA standard of review rather than the AEDPA amended standard of review, [s]ubstantively, the amended § 2254 provides for much greater deference to the state court adjudication of claims, and further refines the presumption of correctness federal courts must accord factual determinations in state court." *Kelley v. Singletary*, 222 F. Supp. 2d 1357, 1361 (S.D. Fla. 2002), *rev'd on other grounds*, ___ F.3d ___, 2004 WL 1637062 (11th Cir. July 23, 2004).[12]

Thus, the Court's discretion in this case is limited to determining whether the state courts' rulings on the *Brady* issues either misapplied or unreasonably applied clearly established federal law or resulted in unreasonable factual determinations based on the evidence presented in the state court proceedings, and the Court finds that the state court did neither. The state courts properly recited the above-noted standards for establishing constitutional *Brady* violations, so the only remaining question is whether they reasonably applied this law to the facts of the case and made reasonable factual determinations in view of the entire record. Petitioner's most significant allegations are that *Brady* material not disclosed by the government includes: (1) a transcript of Neville Butler's statements during a polygraph examination

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[12] In his reply to the State's response and his Objections to the R&R, Petitioner relies heavily on the district court's granting of the habeas petition in the *Kelley* case. However, since Petitioner filed those documents, the Eleventh Circuit reversed the district court, finding no constitutional violations that would entitle the Petitioner to habeas relief.

conducted by the State, (2) the contents of the Moo Youngs' briefcase, including their passports, and (3) information concerning the Moo Youngs' life insurance policy.

Petitioner alleges that the State's failure to disclose the results of Neville Butler's polygraph is a *Brady* violation that merits a new trial, particularly alleging that Petitioner was not informed of the weakness of the government's case based on indications that Butler was being deceptive in answering particular questions and that he was deprived of the ability to cross-examine Butler on some statements made during that polygraph examination that were inconsistent with statements made to police and during depositions on other occasions. The prosecutors have consistently maintained that Butler passed the polygraph because his answers indicated truthfulness on the essential elements of the crime—the identity of the killer and the events in Room 1215 at the time of the murders. The polygraph report makes clear that Butler's answers indicated deception on questions about waiting in the car with Petitioner after the murders and about whether he had purchased the immersion heaters, and his answers were ambiguous as to whether he knew that Derrick Moo Young was going to be shot before he went to the meeting. Petitioner prefers to characterize this as a "failed" polygraph and claims that trial counsel should have been told how Butler had performed on the polygraph and been given a copy of the report.[13] While Petitioner appears to recognize that the polygraph report itself would have been inadmissible, he claims that the contents of the report would, even if inadmissible,

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[13] The Florida Supreme Court and the trial court agreed that Butler's performance on the polygraph cannot be characterized as having failed it, noting that he had only failed a small number of questions and passed with regard to the critical questions, including "having actually witnessed Maharaj shooting the victims, having not been armed, and drugs not being involved in the crime." *Maharaj IV*, 778 So.2d at 955. The Court concurs with the Florida Supreme Court's finding in this regard.

have been critical in preparing for trial and for cross-examining the witness.

The Florida Supreme Court denied relief on this basis stating that "it is abundantly clear from this Court's opinion on direct appeal that the defense was aware of Butler's performance on the polygraph examination . . . . Since the defense had knowledge of the polygraph results, there is no *Brady* violation." *Maharaj IV*, 778 So.2d at 955. In this instance, there is significant evidence from the post-conviction proceedings that the defense was not aware of the polygraph results, as it appears from that record that neither trial counsel nor the defense investigator knew that Butler's answers to certain questions had been indicative of deception. However, even if the Court disagreed with the Florida Supreme Court's conclusion, the Court does not believe its finding was unreasonable. Even though the prosecutors did not provide a copy of the report, they did inform Petitioner's counsel that Butler had changed his story both before and after the polygraph examination, which may have been sufficient notice that his responses had not all indicated truthfulness.[14] More importantly, the Court agrees with the post-conviction trial court that, even if *Brady* material was withheld, the Petitioner suffered no prejudice.[15] In its letter

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[14] In a letter dated March 20, 1987, the prosecutor notified trial counsel that Butler had "passed with regard to the questions asked of him as to your client being the shooter in this matter and him not being armed or participating in the shootings of the Moo Youngs. However, questioning of Mr. Butler, prior to his polygraph examination and subsequent thereto, has resulted in my obligation under Florida Rules of Criminal Procedure 3.220, to inform you that Mr. Butler had some material corrections and additions to make to the deposition testimony he has previously rendered to you."

[15] The post-conviction trial court reasonably found that:

> Even assuming arguendo that the evidence was suppressed, the confidence of the verdict would have been unaffected since ample evidence of Butler's several statements (police pre-interview, sworn

regarding Butler's change of statement, the prosecutor invited trial counsel to redepose Butler. Trial counsel accepted this invitation, redeposed Butler, and questioned him extensively on his changed testimony. Trial counsel was then able to significantly impeach Butler at trial with his inconsistent statements and get him to admit to having lied under oath on prior occasions. Thus, even without a copy of the polygraph report, counsel was able to successfully impeach Butler. As the Eleventh Circuit found in another case, "defense counsel effectively capitalized—in one way or another—on every potentially valuable argument the . . . item[] support[s], even though the item[] [itself was] unavailable to counsel at the time of trial." *Kelley*, 2004 WL 1637062, at *44. Moreover, Butler's statements during the polygraph examination were mostly consistent with statements he gave in prior or subsequent depositions, and any minor variations in the statements, such as his statement during the polygraph exam that he got out of the car to put money in the meter while he and Petitioner were waiting in front of the hotel, are insignificant differences that would not have had a significant impact on the outcome of the trial had trial counsel been able to cross-examine on those inconsistencies. This is particularly so in view of Butler's consistency on the critical points of his

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statements, two depositions, and trial testimony) were fully presented before the jury. The Court finds that all of Butler's statements were consistent in describing how the defendant committed the murders and the physical evidence. Further, trial counsel effectively presented before the jury during his cross examination of Mr. Butler that the witness lied to police and prosecutors and admitted he did not understand the significance at all for oaths to tell the truth. The Court concludes that the evidence did not preclude counsel from mounting a vigorous cross examination or attacking the credibility of Butler.

Maharaj PCR Order at 16, 20 (further noting that the "Court does not find a reasonable probability that the exclusion of the polygraph results affected the judgment of the jury.").

description of what happened inside Room 1215 at the time of the murders and the fact that Butler's testimony on those events was consistent with the physical evidence and reconstruction of the crime.

Petitioner views the State's alleged failure to disclose the contents of the briefcase as one of the most significant issues in the case, because he claims that the contents contained enough evidence regarding illegal drug dealing and money laundering by the Moo Youngs' to link other potential suspects to the murder of the Moo Youngs. In fact, much of the Petition is devoted to developing and explaining the significance of the evidence that Petitioner claims would have been developed had trial counsel had access to the contents of the briefcase and to attempting to establish the relevance of all of that hypothetical evidence. Petitioner focuses particularly on the Moo Youngs' passports, which were in the briefcase, claiming these were always in police custody and could have led to evidence of illegal activity by notifying trial counsel as to the extent of the Moo Youngs' travel habits. However, the Florida courts dealt extensively with this issue and concluded that no *Brady* violation had occurred. This Court finds those conclusions to be reasonable.

Although the prosecutors deny having seen the contents of the briefcase, it is clear that Buhrmaster had access to the briefcase at times during the investigation and that the defense investigator went to the police station at one point in his investigation to look at the contents of the briefcase, which he was aware of from the crime scene photographs. On that occasion, Buhrmaster informed the investigator that the briefcase had been returned to the family of the victims, although he testified in the post-conviction proceedings that he did subsequently retrieve the contents of the briefcase. It appears that the defense investigator neither followed up with a subpoena to the victims' family, nor did the investigator or trial counsel take further steps to obtain the briefcase contents

after the police had regained possession of them. The Florida Supreme Court found that the materiality of prejudice prong of the *Brady* test was not met, because the Petitioner was aware of the location of the contents of the briefcase and did not compel their production through a subpoena. Therefore, the Court stated that "[t]here is no *Brady* violation in this situation because the evidence cannot be found to have been withheld from the defendant." *Maharaj IV*, 768 So.2d at 954. Moreover, the trial court further found that, even had the evidence been improperly withheld, the error would be harmless, because any information obtained through investigation of the contents of the briefcase has been speculative evidence regarding the character of the victims, it would not have been admissible at trial, and it could not have been used to impeach Neville Butler. *See Maharaj PCR Order* at 21. Based on its review of the Petition and supporting evidence, the Court finds this to be reasonable application of law and reasonable findings of fact. Moreover, while some evidence accumulated since trial does suggest that the victims may have been involved in some illegal activity, the Petitioner has still not shown a firm link between the Moo Youngs and narcotics trafficking or money laundering, much less shown that such a link could desmonstrate that someone else actually committed the murders.[16]

Petitioner's third main *Brady* argument is that the prosecution never disclosed any information in its possession about the Moo Young's one million dollar life insurance policies, which were taken out only months before the murders. Petitioner suggests that this information is exculpatory in itself because it shows that the victims feared for their lives

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[16] As the post-conviction trial court reasonably concluded, "[t]here is no evidence that the victims were convicted of any felony or a crime of moral turpitude. At best, there is speculation that the victims may have been involved in some scheme to commit fraud against the defendant and possibly others." *Maharaj PCR Order* at 16.

and perhaps knew that there were people other than the Petitioner who had a motive to kill them. Alternatively, Petitioner argues that, at the least, the policies should have been disclosed because that information would have provided an investigative lead that would have generated information helpful to the defense. As evidence that the State knew about the policies, even though prosecutors denied knowing about them until sentencing, Petitioner points to Detective Buhrmaster's statement that he knew of them before trial and to a legal document from civil litigation over payment of the policies which may have been sent to prosecutors prior to the trial.[17] However, even if the State knew about the insurance policies before trial, the state court reasonably found that any failure to disclose information about them did not create a constitutional violation because "[t]here has been no showing that the fact of the insurance policies is exculpatory . . . . Although this information is interesting, there has been no showing of its materiality, that is, there has been no showing that this evidence tends to negate the conviction or the sentence." *Maharaj IV*, 778 So.2d at 953-54. This Court would agree. In and of themselves, the insurance policies are not exculpatory, because there are numerous reasons for taking out insurance policies, even large policies, other than concern about being murdered. Moreover, as with the contents of the briefcase, the evidence that perhaps could have been developed based on disclosure of the policies is too speculative to have altered the outcome of the trial and could not have been used to impeach the State's primary witnesses.

The Court does find, nonetheless, that in these three areas, Petitioner has made a substantial showing of a constitutional violation sufficient to entitle him to an appeal of these issues.

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[17] At the post-conviction hearing, neither prosecutor could remember having seen the document prior to trial, and one of the prosecutors referred to some notations on the document that suggested it had been received after the criminal trial.

Since it appears that the police did have custody of the contents of the briefcase after the defense investigator specifically asked to look at it, the Petitioner has made a substantial showing of the deprivation of a constitutional right since it is possible that evidence adduced from the investigation of the contents could have, if admissible, bolstered the Petitioner's theory that he was set up by someone else who had a motive to murder the Moo Youngs. It is also possible that knowledge of the life insurance policies could have, at the least, led to discoverable evidence from the insurance investigation, which may, again, have bolstered the defense. And finally, the statements from the polygraph exam, though their effect would have likely been of little significance given the substantial impeachment of Butler that trial counsel was able to achieve, may possibly have had some impact on the jury. *See also United States v. Glover*, 596 F.2d 857, 867 (9th Cir. 1979) (noting it would be a Brady violation if "the government failed to reveal that a polygraph test administered at the prosecution's behest to its principal witness indicated he was lying."). While the Court agrees with the Florida courts that there was no constitutional violation through any alleged withholding, either individually or cumulatively, of these items, Petitioner has offered sufficient evidence to warrant a certificate of appealability on these three grounds.

As to Petitioners' various other *Brady* claims, the Court agrees with the Florida Supreme Court that no constitutional violations occurred. The Petitioner faults the State for failing to reveal that Adam Hosein, who Petitioner had told his attorney he suspected of setting him up, had left a message for Eddie Dames in Room 1215 some time around the day of the murders.[18] However, the prosecution neither had then nor

[18] It is not clear from the documents when Hosein left the message. Detective Amato prepared a report regarding his contact with Hosein's ex-wife on October 17, 1986, the day after the murders, but does not specify whether Hosein had left the message with the hotel that day, the day of the murders, or at some prior date.

now any information indicating any involvement by Hosein in any aspect of this case, and thus there is no reason to believe that disclosure of this message would have had any effect on trial counsel's investigation or on the outcome of the trial.[19] Although Petitioner continues to contend that either Hosein or Jamie Majia commited the murders, he has yet to offer any evidence that is not entirely speculative and based on mere conjecture that either had any connection to this crime.

Petitioner also argues that the prosecution violated *Brady* by failing to turn over notes or other information indicating that Petitioner had invoked his rights to an attorney and to silence during questioning by Detective Buhrmaster. However, it is clear from Buhrmaster's notes and homicide investigation reports that, even if Petitioner invoked his rights at any point, all of the statements admitted at trial occurred before any such invocation. Buhrmaster's notes show that, toward the end of his interrogation on the night of the murders, October 16, 1986, Petitioner made a statement to the effect of "[t]hat's all I have to sat about today's activities." However, even if such a statement were made and constituted an invocation of his right to silence, the only events that occurred after this statement was that Buhrmaster confronted him with the evidence against him and advised him of his arrest. Although Petitioner did apparently again briefly deny his involvement and deny being in Room 1215 that day, all of

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[19] Although Petitioner continues to contend that either Adam Hosein or Jamie Majias, a Colombian who was staying in the room across the hall from where the murders occurred, could be the real killers, he has still produced no evidence that either of them was involved. At best, he has shown a tenuous connection between Hosein and some of the other individuals who played a part in this trial. While it may be that this would have given trial counsel some additional evidence from which to argue that someone other than Petitioner was the killer, the speculative and unsupported allegations based on the limited information obtained since trial is certainly not sufficient to entitle Petitioner to a new trial.

the statements admitted at trial through Buhrmaster's testimony had already been made prior to that alleged invocation of the right to silence. Buhrmaster's notes further reflect that Petitioner invoked his right to an attorney four days after the murders when detectives went to the jail to question him again after getting results back on the latent fingerprints he had left in the room. At that time, Petitioner invoked his right to an attorney, and, as reflected in his police report, Detectives Buhrmaster and Amato left immediately without questioning the Petitioner. The Florida Supreme Court clearly addressed this argument, stating that Petitioner invoked his right to an attorney four days after his arrest and that, for this reason, "it did not affect the validity of statements made prior to that time, including the statement concerning his presence in room 1215. Any failure to disclose this information was not material to the issue of the defendant's presence in room 1215." *Maharaj IV*, 778 So.2d at 956. Thus, even if this were *Brady* material that was not disclosed, there would be no prejudice, since it would not have allowed the court to exclude Petitioner's post-arrest statements.[20]

Petitioner challenges the State for failing to turn over an anonymous memo in its files that reflected poorly on the character of Eslee Carberry, one of the witnesses in the trial.

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[20] Handwritten notes on what appears to be a trial outline of Buhrmaster's direct testimony do note that on October 20, 1986, "[Defendant] invokes his right to attorney" when Buhrmaster and Amato went to the jail to talk to him. The handwritten notes further state "forget this * be careful about this." However, it is clear that these notes are simply reminders that Buhrmaster did not need to testify about this on direct examination, as evidenced by the further note "only if Eric [defense counsel] ask [sic] about this." Moreover, in his Petition, Petitioner reverses the sequence of events, stating that the invocation of the right to counsel occurred on the night of the murders and the alleged invocation of the right to silence occurred later, when it is clear from the notes and police report that the invocation of the right to an attorney did not occur until 12:18 a.m. on October 20, 1986, four days after the murders.

The Florida Supreme Court appropriately rejected this claim because "[t]he jury was well aware of the surly reputation of both Carberry and the newspaper he ran," and thus use of this memo for impeachment would not have added anything to the case that would have undermined confidence in the verdict. *Maharaj IV*, 778 So.2d at 955. The Florida Supreme Court also rejected Petitioner's claim that he should have been notified that two other people named Maharaj owned Smith & Wesson guns as irrelevant because they owned .38 caliber guns rather than the nine millimeter gun that was the murder weapon. *Id.* at 956. Moreover, Petitioner has not shown how it would be relevant even if they had owned a gun of the same caliber, because, unlike with Petitioner, there would have been no corroborating evidence to link those individuals named Maharaj to Room 1215 at the Dupont Plaza on October 16, 1986. Plaintiff also states that a letter authored by a William Penn investigator demonstrates that Buhrmaster did not turn over certain *Brady* information to the defense. Although Petitioner appears to concede that the Florida Supreme Court was correct in concluding that the letter itself is not *Brady* material because it was not in possession of the State, he claims that the letter nonetheless demonstrates that Buhrmaster withheld information concerning his investigation. However, a careful review of that letter reveals that there is no relevant information which Buhrmaster discussed with the insurance investigator of which the defense was not also aware, except to the extent that it suggests the police department had recovered the contents of the victim's briefcase prior to that interview, an issue which has been discussed above. As to supposedly suppressed evidence regarding Petitioner's gun being stolen by the Florida Highway Patrol prior to the murders, the Court agrees with the Florida post-conviction court's finding that there is "no merit to the claim that the prosecution suppressed evidence that the defendant's gun was taken or stolen on or between July 25 and July 26, 1986. This issue was fully presented before the jury

for its consideration." *Maharaj PCR Order* at 15; *see also Maharaj IV*, 778 So.2d at 955 ("This issue was litigated at trial and the State presented witnesses who testified Maharaj's gun was not taken during the traffic stop.").

Finally, the Court further finds that the Florida courts were reasonable in finding that any *Brady* violation due to failure to disclose these documents, either individually or cumulatively, would not have affected the outcome of the trial. As the state court noted, the State presented sufficient evidence to sustain a guilty verdict even if these documents, and new evidence that might have been obtained as a result, had been presented. *See Maharaj PCR Order* at 21 ("The Court concludes that the evidence would not produce a different result on a retrial because of the sufficiency of the evidence to sustain the defendant's conviction."). The Court agrees that the State presented a great amount of evidence pointing to Petitioner's guilt, and it is unlikely that, if admissible, the character evidence regarding the victims and the other evidence that Petitioner claims would have been developed before trial if these disclosures were made would have had any effect on the jury's evaluation of the evidence. *See Peoples v. Campbell*, ___ F.3d ___, 17 Fla. L. Weekly Fed. C853, C862 (11th Cir. 2004) ("And finally, the evidence that [defendant] committed the murders was overwhelming. In the absence of prejudice, . . . [defendant] is not entitled to relief").

C. False Testimony Presented at Trial

Petitioner's fifth ground for relief alleges that the State introduced perjured testimony in support of its case. In order to prevail on such a claim, Petitioner must show that "the prosecutor 'knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony,' . . . and that the falsehood was material." *Brown v. Head*, 272 F.3d 1308, 1317 (11th Cir. 2001) (quoting *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995)), *cert. denied*,

537 U.S. 978 (2002). Thus, it is significant that "only knowing use of perjured testimony constitutes a due process violation." *United States v. Lopez*, 985 F.2d 520, 524 (11th Cir. 1993). Testimony that is merely inconsistent does not demonstrate knowing use of false testimony. *See, e.g., United States v. Bailey*, 123 F.3d 1381, 1396 (11th Cir. 1997) (testimony that is "nothing more than a memory lapse, unintentional error, or oversight" is not perjury); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994). ("We refuse to impute knowledge of falsity to the prosecutor where a key government witness' testimony is in conflict with another's statement or testimony.").

Petitioner's claims regarding use of false testimony, however, rely on conclusory statements that certain alleged facts are necessarily the truth, that the prosecutor knew that they were the truth, and that they, nonetheless, permitted witnesses to testify to the contrary. He claims, most significantly, that the prosecution knowingly used false testimony from Shaula Nagle (Derrick Moo Young's daughter), from Neville Butler, from Eslee Carberry, and from Tino Geddes. However, none of the statements that Petitioner claims constitute perjured testimony can be shown to be anything more than inconsistencies, either with each witness's prior testimony, with the testimony of others, or with alleged "facts" that have not been established as the truth. To the extent that Geddes' and Butler's testimony at trial was different from their prior testimony or statements, Petitioner has not shown that their trial testimony was false, and, on cross-examination, the trial attorney effectively pointed out the inconsistent statements of the witnesses and forced them to admit that they had lied under oath in their previous statements. Further, the prosecutor did not even "use" the testimony of Shaula Nagle, because she did not testify at trial. Even if she had, the Florida Supreme Court reasonably found that "[n]ot only is the allegation based upon minor inconsistencies between Nagel's testimony in the civil suit concerning the Moo

Youngs' life insurance policies, but this issue is also meritless because the civil proceedings were conducted after the criminal trial [and] there is no basis to conclude the State was aware of these inconsistencies when Nagel testified" in her criminal deposition. *Maharaj IV*, 778 So.2d at 956.

The only claim that Petitioner has raised where it is arguable that the testimony was false and that the prosecutor knew it was false was Butler's statement that he had voluntarily changed his testimony by later admitting that he had set up the fatal meeting between Petitioner and the Moo Youngs in order to clear his conscience. It appears likely from the testimony of the prosecutors that he, in fact, changed his testimony because he was confronted with either the request to take a polygraph or with the results of the polygraph examination. However, whether the prosecutor "knew" Butler's testimony on his reasons for changing his testimony was false is debatable, since, in Butler's mind, he may still have deemed his change of story both voluntary and an act of conscience clearing.[21] Regardless, Petitioner cannot meet the third part of the perjured testimony requirement, because he has not shown that this statement was material. A false statement can be considered material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Brown*, 272 F.3d at 1317 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). In this instance, there is no reasonable likelihood that the revelation that Butler's change in testimony may not have been based entirely on his own initiative would have affected

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[21] The Florida Supreme Court put it this way: "While the statement concerning an act of conscience may not be entirely true, there has been no showing that it was entirely false. . . . He was not given immunity and changes were made to the testimony prior to the polygraph . . . . The State opined Butler may have considered his change of testimony voluntary because he voluntarily appeared for further questioning." *Maharaj IV*, 778 So.2d at 957.

the judgment of the jury. The important aspect of the change in story was that Butler had shown that he was willing to lie under oath, that he had lied because of concern regarding how his involvement would be regarded by the prosecutors, and that he had told inconsistent stories at various times. That is, it was primarily Bulter's change in testimony, rather than the impetus for the change, that would have been important to the jury, and this was all effectively brought out in cross-examination and closing arguments. Moreover, if he did in fact change his story only because of the polygraph examination, the jury never would have learned this, since the judge had specifically warned Butler against mentioning the polygraph exam during his testimony.[22]

Petitioner also suggests that Butler's grand jury testimony was inconsistent with his later testimony. For example, Petitioner claims that Butler originally testified before the grand jury that he had tried to intervene during the argument between Maharaj and Derrick Moo Young and that Maharaj had forced Butler out of the hotel room at gunpoint and threatened to kill him if he said anything to the police. Petitioner alleges that these transcripts should have been turned over under case law that suggests grand jury testimony, despite being privileged, should be turned over after grand jury proceedings are completed if "justice requires it" or if the testimony contains a version of the witness's story that has not been revealed. *See Dennis v. United States*, 384 U.S. 855, 870 (1966); *Miller v. Wainwright*, 798 F.2d 426, 430 (11th Cir. 1986), *vacated by* 480 U.S. 901 (1987), *reinstated by* 820 F.2d 1135 (11th Cir. 1987). However, Petitioner admits that these inconsisteneies are based on a review of the prosecutors' notes and not on the actual testimony. In contrast, the

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[22] Moreover, Petitioner cannot use the results of a polygraph to prove that testimony is false, because polygraph results have consistently been found to be scientifically unreliable, and an answer that is indicative of deception cannot prove that the answer is, in fact, false.

post-conviction court evaluated the actual grand jury transcripts and discovered only minor inconsistencies between Butler's grand jury and trial testimony, concluding, therefore, that Petitioner was not entitled to the transcripts. Based just on the prosecutors' summary, this Court would agree that any discrepancies are minor and would not have changed the outcome of the trial. Moreover, the Florida Supreme Court addressed this argument in its post-conviction opinion and rejected Petitioner's entitlement to the transcripts, stating that Petitioner was aware that Butler had changed his testimony before trial and that "there were no inconsistencies that were hidden from him." *Maharaj IV*, 778 So. 2d at 959. Therefore, the Court does not find this conclusion to be an unreasonable finding of fact in light of the evidence, nor is the Florida Supreme Court's holding an unreasonable application of federal law.

D. Ineffective Assistance of Counsel

As his sixth ground for this habeas petition, Petitioner points to a number of reasons his trial counsel from his criminal trial should be considered constitutionally deficient so as to entitle Petitioner to a new trial. The post-conviction trial court found that some of these arguments had been procedurally defaulted and summarily denied several claims, but considered the merits of some of the claims, particularly with respect to whether counsel's advice on various waivers during trial was ineffective.[23] In order to show that a defen-

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[23] However, the trial court and Supreme Court also gave alternative explanations for denying some of the procedurally defaulted claims. Although the Court finds that the state courts did "rely upon the procedural default" in denying these grounds, this Court will consider, in an abundance of caution, whether the state court's denials on the merits were factually and legally reasonable. *See, e.g., Messer v. Florida*, 834 F.2d 890, 893 (11th Cir. 1987) ("When the state court has declined to rely upon a procedural default, . . . the procedural default no longer bars consideration of the issue in federal court.") (internal citation omitted);

dant's trial counsel was ineffective such that it requires reversal of a conviction, a petitioner must demonstrate two things:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to be constitutionally deficient, counsel's performance must fall "below an objective standard of reasonableness," and courts are cautioned against second guessing tactical and strategic trial decisions using hindsight. *Id.* at 688-89. Instead, a court must look at "the facts of the particular case, viewed as of the time of counsel's conduct," and the reviewing court "must indulge in a strong presumption" that counsel performed effectively. *Id.* at 689-90. "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000).

The Florida courts found, in this case, that based on such an objective view, trial counsel's decisions were not unreasonable and were strategic decisions that were based on the information he had at the time and on his assessment of

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but see Davis v. Singletary, 119 F.3d 1471, 1479 (11th Cir. 1997) ("It is settled that once the state courts have ignored any procedural bar and rejected a claim on the merits—not in the alternative but as the only basis of decision—that claim is not barred from federal habeas review.").

various factors involved in the trial. As the post-conviction court stated:

> The record shows that counsel deposed all essential witnesses, hired an investigator to investigate defendant's alibi defense and the background of the victims, and that counsel made reasonable tactical or strategic trial decisions, based on facts known to him at the time and his extensive experience in handling murder cases. Further, the Court does not find that counsel was ineffective because there was no prejudice.

Maharaj PCR Order at 10.[24] This court agrees with that assessment and finds that none of the ineffectiveness claims raised by Petitioner state a constitutional violation.

Petitioner's first argument regarding ineffectiveness is that his trial counsel did not conduct a sufficient pretrial investigation, and thus did not uncover the Moo Young's connection to drug trafficking and money laundering. Counsel can, in fact, be found ineffective for conducting an inadequate investigation; "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, the testimony from trial counsel and the defense investigator shows that both did undertake significant pretrial investigations, interviewing and deposing numerous witnesses and other individuals, and that trial counsel made reasonable decisions to stop investigating certain aspects of the case, such as the Moo Young's criminal involvement,

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[24] Although it is possible for any counsel to be ineffective, the Court notes that Petitioner's trial counsel was retained and compensated and had significant prior trial experience with first-degree murder cases, including ones where the State was seeking the death penalty. *See Chandler*, 218 F.3d at 1316 ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

when the investigations proved fruitless. Trial counsel testified that he and the defense investigator did attempt to find such criminal activity by the victims because "my client from the outset voiced his belief they were involved in some major illegal narcotics" but was "never able to find anything to document that or to establish that they were anything other than law abiding citizens." Trial counsel also noted that, even though his client would "mention Adam Hosein and his suspicions relative to Adam Hosein" at least once a day, he "learnt of no direct information pertaining to" a relationship between the Moo Youngs and Hosein. Although Petitioner now has uncovered some evidence possibly linking the victims to various criminal activities and to Hosein, that evidence is still tenuous and speculative, despite an extensive investigation undertaken by the insurance company and the considerable work done by his post-conviction attorneys. Given the lack of evidence connecting Hosein to this crime, trial counsel cannot be found ineffective for being unable to find the tenuous connection that post-conviction counsel has tried to make into a major issue. Thus, the Court finds that the Florida Supreme Court's finding on this matter is a reasonable factual finding: "Maharaj argues counsel was ineffective for failing to investigate Adam Hosein and Jamie Majias for possible involvement in these murders. Since trial counsel testified at the evidentiary hearing that he investigated these persons, but could not connect them to the events surrounding these murders, this claim of ineffective assistance will not be discussed further." *Maharaj IV*, 778 So.2d at 958 n.11. In fact, despite post-conviction counsel's Herculean efforts, Petitioner still has not connected them to the murders.

One of Petitioner's primary contentions is that his counsel was ineffective for failing to put on any alibi defense, arguing that the Petitioner can prove that he was elsewhere at the time of the murders. However, as the Florida courts found, the testimony of trial counsel clearly demonstrates that his advice

not to put on an alibi defense was a reasonable, strategic trial decision. In fact, counsel had originally advised Petitioner against filing the list of alibi witnesses at all, testifying that he had reviewed the affidavits of all of the alibi witnesses and interviewed at least a couple of them. He stated that "the affidavits were affidavits that I thought would cause Mr. Maharaj more harm than good. It appeared to me as if these were alibi witnesses who had been sought out, trying to account for every half hour of the entire time surrounding the incident and it seemed all too convenient . . . . My advice to Mr. Maharaj was to proceed without supplying the State any additional information." However, in compliance with Petitioner's wishes, he "reluctantly" filed the alibi list, which included the name of Tino Geddes, whom the State would not have known about otherwise.[25] As trial counsel noted, this filing forced him to change his theory of defense, "[e]specially after the state filed . . . a state witness list listing all of the prior defense witnesses as state witnesses." As it turned out, the State contacted Geddes, who recanted his entire affidavit.[26] At the trial, Geddes and Clifton Segree, an individual who had been visiting Geddes from Jamaica during this period, both testified that Petitioner had asked them to say they were with Petitioner at the time of the murders. Geddes further testified that he had recruited other witnesses to back up Petitioner's alibi by getting them to lie or convincing them that they had seen the Petitioner with him on the day of the murder, when in fact those witnesses would have seen them

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[25] Trial counsel testified that "[t]he Tino Geddes affidavit was highly suspect from the outset. To me it was beyond belief and I was particularly nervous about the possibility of giving the State access to information whereby they could determine the existence of Tino Geddes."

[26] Although Petitioner claims trial counsel was ineffective for not deposing Tino Geddes, he neglects to mention that, nonetheless, Geddes was deposed, apparently by the State, on June 5, 1987, and there is thus little reason that trial counsel needed to conduct his own deposition.

together on a different day.[27] Based on this testimony, trial counsel, wisely, advised his client not to put on any alibi witnesses.

Nonetheless, Petitioner contends that the trial counsel was ineffective because he failed to fully investigate the alibi witnesses story before reaching this conclusion. However, it is clear from counsel's testimony that he had spoken to at least a couple of witnesses, had read all of the alibi witness affidavits, and had found them not worthy of belief.[28] The Florida Supreme Court reasonably found that "[c]ounsel personally spoke to some of the witnesses and evaluated their testimony. Counsel found the alibi witnesses not credible, and he made a strategic decision not to present them after the State presented evidence of an attempt by Maharaj to fabricate an alibi. Counsel cannot be ineffective for strategic decisions made during trial." *Maharaj IV*, 778 So. 2d at 958. Further, it is clear that the decision not to put on any wit-

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[27] Specifically, Geddes testified that he had gone to Jamaica twice to try to convince Segree to testify at trial that the two of them had been with Petitioner at the time of the murders or to, at the least, "[j]ust leave it alone and have nothing at all to do with it . . . . [I]f you won't help us, don't hurt us." As to the other witnesses, Geddes testified that he was acting on instructions from the Petitioner when, a week or so after the murders, he spoke to two people at the Disco Lounge and an auto mechanic and "put the suggestion to them" that they had seen him with the Petitioner on Thursday, October 16, at around 11:30 a.m., when in fact Petitioner, Geddes, and Segree had been there the previous day, Wednesday, October 15, at about that time.

[28] Even if Petitioner were correct that trial counsel did not adequately investigate, this would constitute a reasonable explanation for his decision to not investigate further, and would thus satisfy the *Strickland* standard. *See Chandler*, 218 F.3d at 1318 ("Counsel need not always investigate before pursuing or not pursuing a line of defense. . . . [C]ounsel's reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.").

nesses was concurred in by the Petitioner, despite his prior insistence on presenting the alibi witness list. Before the defense rested, the prosecutor asked the judge to conduct a colloquy of Petitioner because "the defense had listed witnesses who have been fully deposed and questioned in the case" and requested that the court "ask the defendant if he does agree with the strategy at this point in not calling any defense witnesses." The judge did so, and the Petitioner stated he had discussed it with his attorney and agreed with the decision not to put on any defense witnesses.[29]

Petitioner also claims that counsel was ineffective for failing to move for suppression of his post-arrest statement, the photo-array shown to the Dupont Plaza Hotel reservation staff, and generally for his failure to file pretrial motions or object to the admission of certain evidence. The Court agrees that the Florida courts' rejection of these arguments was reasonable. First, in his post-conviction hearing testimony, Petitioner's trial attorney explicitly testified that "I did not conclude that there was not a legal basis for not filing a motion to suppress. I decided that I would not file a motion to suppress, that I would argue the point before the jury . . . . It was a tactical decision made by me." Second, with respect to the photos that were shown to the reservation agents at the Dupont Plaza Hotel, trial counsel testified that he made the strategic decision not to move to suppress them, stating that he had deposed the witnesses and had decided, instead, "to argue the valid points at trial with respect to their ability to make an identification, their ability to be correct in that identification."

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[29] Petitioner also criticizes his attorney for not speaking to all of the alibi witnesses from whom the investigator got affidavits. However, trial counsel testified that he spoke with at least "a couple" of them and that the "ones I spoke to really wanted nothing to do with any further involvement with this case."

As to other pretrial decisions, trial counsel noted that he had not moved to exclude the newspaper articles in a written motion, but he did do so, unsuccessfully, in pretrial proceedings. A considerable portion of this Petition is devoted to showing how the admission of the newspaper articles negatively affected the outcome of the case and arguing that, but for *Brady* violations or ineffective assistance of counsel, the articles would have been excluded. However, the state courts have clearly indicated, both on direct appeal and in post-conviction proceedings, that these articles were admissible because they were evidence of motive for Petitioner to kill the Moo Youngs. *Maharaj IV*, 778 So.2d 957 ("As we have previously held, the newspaper articles were admissible to show motive. . . . These articles, whether true of false, clearly demonstrate animus between the defendant and decedents."). Since the admissibility of these articles has been clearly established, and since neither further argument by trial counsel or proof of falsity of the articles would have altered a ruling on their admissibility for the purpose of establishing motive, the Court rejects Petitioner's contention that their admission was the result of ineffective assistance or of any *Brady* violation. Other issues, such as the admissibility of the polygraph tests, were taken up and adequately addressed by counsel in pretrial proceedings, even if not the subject of written motions. Thus, counsel's decisions regarding the filing of pretrial motions were reasonable, strategic decisions that cannot constitute ineffective assistance.[30]

Petitioner also alleges that trial counsel failed to properly impeach Detective Buhrmaster, particularly with a hearsay

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[30] Petitioner's claim that counsel was ineffective for not moving for admission of two clearly inadmissible pieces of evidence, the *Scott* Report and Petitioner's polygraph examination results, shows the extent to which Petitioner overreaches in criticizing nearly every aspect of trial counsel's work. Trial counsel should, instead, be commended for not undertaking a futile litigation over evidence that so obviously should have been excluded.

statement by a fellow detective who stated in a deposition that Buhrmaster had told him the Petitioner admitted to being "there" on the day of the murders. However, as the Florida Supreme Court noted, Detective David Rivero's post-conviction testimony makes clear he only heard Buhrmaster state that the Petitioner had been "there" that day, and did not know whether that meant he had been at the hotel, which was consistent with Buhrmaster's trial testimony, or that he had been in Room 1215. The Court agrees that, since this ambiguous statement by Rivero would have been, at best, ineffective impeachment, trial counsel cannot be faulted for failing to use it. In fact, Rivero even stated in his pretrial deposition that he had merely assumed Buhrmaster was talking about the room, stating "Well, I presumed the room, when he told me that; but I don't remember Buhrmaster specifically saying Room 1215." While Petitioner points to a couple of other items that he claims should have been used to impeach Buhrmaster, trial counsel's failure to raise these particular arguments cannot be considered constitutionally deficient just because a different counsel may have cross-examined Buhrmaster differently.

Trial counsel's "failure" to properly impeach Neville Butler, the eyewitness to the murders whose statements had changed at various points during the pretrial period, is another major ground upon which Petitioner requests relief. However, as the Florida courts found, it is clear from the trial transcript that counsel conducted an extensive cross-examination of Butler and impeached him repeatedly with his inconsistent statements made under oath to the police on the night of his arrest and during three days of deposition that trial counsel had conducted during the pretrial period. *Maharaj IV*, 778 So.2d at 957 ("The claim has not been demonstrated because counsel did impeach Butler with his prior inconsistent statement. Failure to present cumulative evidence is not ineffective assistance of counsel."); *see also Chandler*, 218 F.3d at 1319 ("Counsel is not required to present every

nonfrivolous defense . . . . Considering the realities of the courtroom, more is not always better."). Trial counsel was repeatedly able to get Butler to admit that he had lied to the police about certain aspects of the crime and had lied in his first deposition because he was concerned about self-preservation and was worried that he would be charged with a crime since he had set up the fatal meeting at the Petitioner's behest. In fact, as the State pointed out, and trial counsel agreed, his "impeachment of [Butler] was so successful that when the jury reached its verdicts, they acquitted this defendant on each and every count where the State had named Neville Butler as the victim of a crime." Thus, any argument that he did not do enough to impeach Butler is simply second guessing of trial counsel's determination as to what was sufficient based on the fact that the jury apparently believed enough of Butler's testimony to convict the Petitioner of the murders. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) (holding that counsel was not ineffective for failing to elicit more testimony from the witnesses because perfection is not required).[31]

Petitioner points to other instances where he claims trial counsel failed to raise certain arguments or impeach certain witnesses with particular information, most notably as it relates to Tino Geddes' stories of prior attempts to kill the Moo Youngs and his testimony recanting his prior alibi statement and to Carberry's testimony regarding the newspaper articles that had been admitted as evidence of motive. Much of the remainder of Petitioner's ineffective assistance of counsel claims involve arguing that trial counsel did not sufficiently emphasize arguments that he did make, such as

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[31] Although Petitioner claims counsel was inept in failing to bring "several legal pads of cross-examination information" with him for the cross-examination of Butler, he fails to point out that the court, upon trial counsel's request, broke early for lunch that day so that counsel could retrieve those notes before completing his cross-examination.

pointing out that a gun without a silencer would have made a lot of noise, yet no one at the hotel heard gunshots. Petitioner's contentions that trial counsel should have done more to emphasize such points or to further impeach the witnesses who he did impeach simply does not state a sufficient reason for finding counsel constitutionally ineffective. The question for this Court is not whether post-conviction counsel would have conducted the examinations differently, but whether trial counsel's decisions were objectively reasonable, always affording the trial counsel a presumption that he performed effectively. *See Chandler*, 218 F.3d at 1314 n.16 ("No lawyer can be expected to have considered all of the ways [to provide effective assistance]. If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense . . . existed and that the lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. . . . [O]ur inquiry is limited to whether . . . course A might have been a reasonable one."). Having reviewed the trial transcript, the allegations in the Petition, and the conclusions of the state courts, this Court does not find anything deficient in counsel's performance on these matters. Trial counsel did extensive pre-trial discovery, including deposing numerous witnesses, conducted a vigorous cross-examination of each trial witness, and argued extensively in closing arguments regarding the unbelievability of certain witnesses' stories and the unreliability and inconsistency of other witnesses. In particular, as noted by the Florida Supreme Court, "counsel repeatedly questioned Geddes about the credibility of his stories during the trial, and he repeatedly argued the veracity of Geddes' allegations to the jury during his two-hour closing arguments." *Maharaj IV*, 778 So.2d at 958. Without going through each of Petitioner's claims, the Court agrees with the Florida courts that, to the extent these claims are not procedurally barred, the Petitioner has not shown that counsel's performance was deficient with respect

to whether he cross-examined on certain items or because he failed to discover particular information prior to trial.

Petitioner's other grounds for claiming ineffective assistance are similarly meritless. Although Petitioner claims counsel should have consulted an array of experts, including handwriting, fingerprint, ballistics, and crime scene reconstruction experts, trial counsel made the strategic decision to base his defense on discrediting Butler and other witnesses put on by the prosecution. Moreover, there is no evidence that any of these experts would have benefitted Petitioner by contradicting the State's experts.[32] Petitioner's claim that counsel was ineffective for not presenting testimony from Manuel Stavros that Petitioner's gun had been stolen prior to the murders is rejected because his pretrial statement indicated that, although he clearly remembered Petitioner telling him money had been taken, he could not confidently testify that Petitioner had also told him the gun had been taken.[33] Although Petitioner claims counsel's handling of jury instruc-

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[32] Despite the fact that Petitioner blames the lack of post-conviction funding for the lack of such evidence, the Court cannot base a finding of ineffective assistance on the mere possibility that these experts might have helped Petitioner's case. Even if he could show deficient performance, Petitioner must make some showing that he has been prejudiced by his trial counsel's failure to retain those experts.

[33] Even in his post-conviction testimony, Stavros only testified that Petitioner told him that a "weapon," probably a gun, had been taken from him, but said that Petitioner did not specify what caliber or type of weapon was taken. Thus, even that testimony would have been of limited value given that the Florida Highway Patrol officers who stopped Petitioner on the night of July 28, 1986, testified at trial that they found several weapons, including more than one handgun, in Petitioner's car. Moreover, in the sentencing phase of his trial, Petitioner testified on several occasions that he had never said that the Florida Highway Patrol officer took his gun and stated that he saw the officer put the gun in the trunk of his rented car. Post-conviction counsel claims Petitioner made those statements at trial because he did not want the officer to get in trouble with his department and lose his job.

tions was ineffective, he has not pointed to any errors in the instructions, nor has he shown that trial counsel did not fully participate in the charge conference. Petitioner's argument that trial counsel's closing was ineffective is really nothing more than post-conviction counsel's opinion based on the fact that trial counsel's arguments, which attempted to discredit the State's witnesses and to point to other possible suspects, failed to persuade the jury to fully acquit Petitioner. Finally, Petitioner's claim that trial counsel's advice regarding waiving the right to testify and the right to a mistrial constituted ineffectiveness are discussed in detail below.[34]

Petitioner raises the ineffectiveness of his appellate counsel as his seventh ground for appeal. Essentially, Petitioner notes that his appellate lawyers obtained a stay of appellate proceedings so that he could file a writ of error *coram nobis* with the trial court based on new evidence obtained through the investigation into the Moo Youngs that was conducted in connection with payment of their life insurance policies. However, Petitioner claims that those lawyers were ineffective because they did not file the writ and because Petitioner was unable to obtain appointed counsel, thus leaving Petitioner effectively unrepresented during this "critical stage" of criminal proceedings. However, the Petitioner has no Sixth Amendment right to representation during post-conviction proceedings. Such proceedings are deemed civil in nature, and the Due Process Clause does not require that a lawyer be provided by the State. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Nonetheless, Petitioner contests the nature

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[34] The Court will not consider Petitioner's claim that counsel was ineffective in his voir dire of the jurors regarding their attitude on the death penalty, since the post-conviction trial court ordered a new sentencing, and Petitioner was subsequently resentenced to life. As to his claim that trial counsel should not have waived sequestration of the jury, the judge conducted an inquiry of each juror midway through the trial to determine if any of them had been exposed to prejudicial information regarding the case, and found that none of them had been.

of these proceedings, claiming they were not collateral, post-conviction proceedings, but rather were part of the direct appeal.

A review of both federal and Florida cases demonstrates Petitioner is wrong in this claim. While a writ of error *coram nobis* can be brought either before or after a direct appeal, it is a form of collateral relief that is brought before the court which tried the petitioner in order to obtain relief from errors of fact which would have prevented entry of the questioned judgment if known at the time. *See Brown v. State*, 485 So. 2d 413, 413-14 (Fla. 1986) (holding that, before an appellate decision is rendered, the petitioner need not seek permission from the appellate court to file the writ, although the appellate court may temporarily relinquish jurisdiction to allow its filing and completion of those "ancillary proceedings"). The Florida Supreme Court has explicitly noted that habeas corpus and *coram nobis* proceedings, though limited in their availability after the creation of statutory post-conviction proceedings through Florida Rules of Criminal Procedure 3.850 and 3.851 and their predecessors, are civil proceedings for post-conviction relief *See State ex rel Butterworth v. Kenny*, 714 So. 2d 404, 408-10 (Fla. 1998). Based on both United States Supreme Court and its own precedent, the Florida Supreme Court further held that individuals have no constitutional right to representation in such post-conviction proceedings, even in capital cases. *Id.* at 408-409; *see also Hill v. Jones*, 81 F.3d 1015, 1024 (11th Cir. 1996) (Hill's . . . argument [for counsel's ineffectiveness] presumes he had a constitutional right to counsel during the . . . *coram nobis* proceedings. . . . While defendants have a Sixth Amendment right to counsel at trial and on direct appeal, they do not have a corresponding right to counsel when collaterally attacking their convictions . . . . even in capital cases.").[35] Thus, despite

[35] While this Court may only grant relief based on a violation of a federal constitutional right to effective counsel, Florida does not even

the fact that the direct appeal was temporarily stayed to allow for the limited post-conviction remedy available through a writ of error *coram nobis*, Petitioner had no constitutional right to representation during those proceedings, and, thus, his appellate counsel cannot be found ineffective for failing to file the writ.[36]

E. Constitutional Right to Testify

As his eighth ground, Petitioner claims he was denied the right to testify on his own behalf There is no doubt that, just as one has a right not to testify in his own criminal trial, a criminal defendant has a right to testify on his own behalf. That right is made explicit both by a federal statute, 18 U.S.C. § 3481, and has been found to be implicit in the Constitution. *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). The right is not unlimited, as a defendant has no right to commit perjury. *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986). However, the right can be waived, and the Eleventh Circuit has held that this is a fundamental right, meaning that a decision to waive the right to testify is personal to the defendant and cannot simply be waived by the trial court or trial counsel. *United States v.*

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guarantee representation in post-conviction proceedings under its own laws. *See Lee v. State*, 847 So. 2d 1142, 1143 (Fla. 3d DCA 2003) ("There is no automatic right to counsel in post-conviction proceedings, and appointment of post-conviction counsel is a matter solely within the discretion of the trial court.").

[36] Although, in his Objections, Petitioner faults the Magistrate Judge for not addressing the inadequacy of his counsel's appellate brief, a review his Petition reveals that he did not raise the inadequacy of the appellate brief as a failing by his appellate counsel in his original Petition. He does cite some cases supporting that a wholly inadequate brief can lead to ineffective assistance of counsel on appeal, but then neither alleges that his appellate brief was inadequate nor points to any specific omissions and errors. In fact, the only ground he states for his claim of ineffective assistance of appellate counsel is the lack of *coram nobis* representation.

Teague, 953 F.2d 1525, 1532 (11th Cir. 1992), *cert. denied*, 506 U.S. 842 (1992).[37] Nonetheless, counsel is still crucial in the decisionmaking process:

> Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege." Moreover, if counsel believes it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify.

Id. at 1533 (internal citation omitted).

Petitioner claims that his waiver of his right to testify was not knowing, intelligent, and voluntary because the advice of his counsel was based on a faulty premise. Specifically, he alleges that counsel believed that Petitioner had outstanding warrants in England on which Petitioner would be questioned if he took the stand and that trial counsel believed one of those warrants was for a homicide, when in fact neither warrant was for homicide and both had been dismissed prior

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[37] As noted by the Eleventh Circuit, the Supreme Court did not explicitly decide whether the right not to testify is a fundamental right, but the Eleventh Circuit found the holding that it is a fundamental right to be implicit in the Supreme Court's decisions. *See Teague*, 953 F.2d at 1531. As the AEDPA only requires that state courts correctly apply federal law as clearly established by the Supreme Court, this Court need not determine whether the Florida post-conviction trial court and Florida Supreme Court applied this extension of Supreme Court precedent by the Eleventh Circuit. However, the Court finds the *Teague* decision to be a logical extension of the Supreme Court cases on the right to testify, and, regardless, the Florida courts' decisions were reasonable under either standard in light of the evidence presented.

to trial. Petitioner further insists that he had always intended to testify in his own defense and that his counsel had told him he would be able to do so, but that, at the last minute in a short five-minute period of time after the government had rested its case, counsel strongly advised that Petitioner not testify. Petitioner claims he felt he had no choice in the matter and that the decision not to testify was actually his counsel's, not his. Petitioner alleges that, in the alternative, this faulty advice and insistence that he not testify constitutes ineffective assistance of counsel.

The state post-conviction trial court and Florida Supreme Court both addressed the denial of relief on this ground. The trial court found that, based on the unrefuted testimony of the Petitioner's trial counsel, trial counsel had discussed the strengths and weaknesses of his testifying at trial, and advised him against testifying because the newspaper articles which the government had introduced as a motive for the murders had raised the issue of character, which could then be a subject of cross-examination. Trial counsel testified that he had worked up questions he would ask the Petitioner and had discussed with Petitioner the possibility of his testifying on nearly a daily basis from the beginning of his representation. Further, trial counsel testified that the Petitioner himself ultimately decided not to testify and that they went over the waiver colloquy that the trial court would require. That court thus concluded that Petitioner made the decision himself and that the ground was without merit. *See Maharaj PCR Order* at 11. The Florida Supreme Court affirmed these conclusions. *See Maharaj IV*, 778 So.2d at 957-58 (agreeing with the trial court's reasoning). This Court agrees with the post-conviction trial court's findings that trial counsel merely advised, perhaps even in the strongest possible terms as recommended by the *Teague* decision, that his client not testify and that the Petitioner himself made the decision to waive that right. At the least, these findings by that state court are reasonable factual finding based on the evidence adduced in the post-

conviction proceeding. Trial counsel's testimony in the state post-conviction hearing makes clear that Petitioner was a sophisticated, well-educated man, that Petitioner understood his attorney's advice, that trial counsel never pressured Petitioner to not testify, that trial counsel made it perfectly clear that the final decision was Petitioners, and that trial counsel would have allowed Petitioner to testify had he decided to do so.[38] No evidence rebutting this testimony was provided, and the post-conviction judge even colloquyed Petitioner on whether he understood that his failure to testify would mean that trial counsel's testimony on this matter would be unrebutted. As such, the state court's factual findings are not only reasonable, but the only conclusion that can be reasonably reached from the evidence presented.

Moreover, the Florida Supreme Court further discussed Petitioner's allegation that he would have testified differently if counsel's advice had been different and that counsel was ineffective for giving the advice that he did. Trial counsel noted as a major reason for recommending against testifying his concern that Petitioner would be extensively cross-examined on the newspaper articles. Petitioner insists that counsel's performance was deficient because he should have further investigated the charges to determine whether there actually were any pending charges against the Petitioner in London, as alleged in the articles. Nonetheless, the Florida Supreme Court determined that even if trial counsel had misapprehended the truth or falsity of the articles, it believed counsel's concern over cross-examination on articles served as an adequate justification for counsel's advice, and thus found that counsel was not ineffective for suggesting that his

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[38] Trial counsel testified repeatedly during the post-conviction hearing that Petitioner was strong-willed and that "he will do what he wants to do. He is a businessman. You don't force Mr. Maharaj to take a position. He will take the position he wants to take." He reiterated later "[y]ou don't force Krishna Maharaj to do anything."

client not testify. That court minimized the argument that Petitioner could have testified that the articles were false, noting that he had not provided any evidence or proposed testimony as to the falsity of the articles and that, even if they were untrue, Petitioner would still "be cross-examined on whether the articles made him angry, which is the reason they were relevant." *Maharaj IV*, 778 So.2d at 958.

Petitioner cites a federal district court case in which the court found that, where an attorney advised his client not to testify due to a prior conviction in Mexico, counsel's failure to investigate the facts and law behind that conviction constituted ineffective assistance where the conviction would have not been admissible and, therefore, could not have been used in cross-examination. *United States v. Moskovits*, 844 F. Supp. 202, 205-06 (E.D. Pa. 1993). However, in that case, the court found, based on testimony of the petitioner and trial counsel, that the trial counsel would not have advised the defendant to waive his right to testify absent his mistaken belief about the Mexican conviction. *See id.* at 207 (stating "we are interested in the representation that Moskovits actually received, not *ex post* alternative rationalizations of that advice"). Here, the Florida Supreme Court found that trial counsel's advice that his client not take the stand was based on more than a mistaken belief as to the pending charges, and thus concluded that he was not ineffective for giving such advice when counsel stated that other legitimate reasons existed at that time for his advice.

Again, the Court finds the Florida Supreme Court's factual and legal findings to be reasonable and proper with respect to the question of whether counsel's advice on this waiver was constitutionally ineffective. Trial counsel made it perfectly clear that the information contained in the articles that the judge had admitted was "of primary concern," and that he was worried that if Petitioner testified, it would merely "turn into a prolonged presentation of this information again . . .

that would allow the state to argue the innuendo and speculation and I felt it was in his best interest not to take the stand." Trial counsel also stated that part of his reason for recommending that Petitioner not take the stand was that the thrust of the defense was "to completely discredit Neville Butler, [and] to cast . . . doubt on the veracity of Detective Buhrmaster's testimony, as well as all of the other state witnesses," a strategy that did not require that Petitioner testify. Giving the state courts' findings the benefit of the presumption of correctness required by the AEDPA, their conclusions are not unreasonable, either factually or legally, and this Court must affirm the state courts' determination.

However, the Court does note that trial counsel also stated that he was not aware that one of the allegations in those articles—that Petitioner had outstanding warrants in England—had been resolved, and he emphasized the large effect of those pending charges on his decision to advise his client not to testify.[39] Because the Petitioner has strongly proclaimed his innocence and did testify forcefully in the penalty phase of the trial that he did not commit the crimes, the Court cannot conclude that his testimony would have had no impact on the jury's verdict in his original trial had he decided to testify. Thus, the Court recognizes a slight possibility that, had trial counsel known the warrants had been resolved, he would have advised his client to testify, his client would have done so, and the verdict would have been different. Therefore, although this Court does not believe counsel was ineffective for advising his client not to testify based on his other concerns noted above, the question of whether Petitioner was denied his right to testify on his own behalf as a

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[39] When asked whether information that "as of May 1, 1987 Maharaj is no longer wanted by the Metropolitan Police in London" would have "been a matter that you would have considered in deciding how to handle the question of Maharaj testifying," trial counsel responded "Yes, it would have."

result of his attorney's failure to investigate whether there were valid warrants for his arrest in England before advising his client on the matter does raise a constitutional question of sufficient magnitude that a certificate of appealability should issue on this ground.

F. Judicial and Prosecutorial Misconduct

Petitioner's ninth ground for habeas relief is that the trial and post-conviction process was riddled with judicial and prosecutorial misconduct to the point that this Court must grant relief from his conviction and sentence. Most significantly, Petitioner points to the arrest for bribery due to a sting operation of the original judge, Judge Gross, at the end of the second day of testimony in the middle of Neville Butler's direct testimony. Petitioner further alleges that the judge had attempted to bribe him, as well, through an assistant state's attorney and that, after he rejected the offer, Judge Gross openly demonstrated his hostility and bias in court and consistently ruled against Petitioner. After Judge Gross was arrested, Judge Solomon took over the case, and the Petitioner claims he, too, demonstrated at least the appearance of impropriety when he had *ex parte* communications with the prosecution, soliciting the state to write an order imposing the death sentence even before the penalty phase proceedings had begun. Petitioner next alleges that the entire State's Attorney's Office should have been disqualified because one of their attorneys solicited a bribe from the Petitioner on behalf of Judge Gross. As one further instance of alleged judicial misconduct, Petitioner notes that the Florida Supreme Court remanded the original denial of a post-conviction evidentiary hearing because the judge who denied it, Judge Glick, had been a supervising attorney at the State's Attorney's Office during Petitioner's trial.

While the arrest of Judge Gross certainly is a significant issue, the Court finds no constitutional error in the manner in which his disqualification from the case was handled by

Petitioner's counsel, by the original trial court, or by the reviewing courts on direct appeal and state collateral proceedings. Petitioner essentially makes five arguments with respect to Judge Gross's arrest. First, he claims that his arrest for bribery during Petitioner's trial should, in itself, be sufficient to state a due process violation due to the great potential that the judge was biased in his case. However, this argument is without merit because the Petitioner was given ample opportunity at trial by the Chief Judge and by Judge Solomon to move for a mistrial based on Judge Gross's arrest, but declined to do so. The Florida Supreme Court made this fording on direct appeal, stating that "Maharaj expressly agreed to proceed with the second judge and . . . his counsel stated he would not move for a mistrial." *Maharaj II*, 597 So. 2d 786, 790 (Fla. 1992).[40] This Court finds no constitutional violation where, as here, the Petitioner waived his right to a mistrial and went forward with the case.

Second, Petitioner states that his counsel was ineffective for not moving for a mistrial, and that his counsel's ineffective assistance creates a constitutional violation that makes his waiver of mistrial invalid. Again, the Court finds no merit to this argument. As the Florida Supreme Court said in its post-conviction opinion, the presiding judge offered to grant a mistrial after Judge Gross was arrested, but Petitioner declined the offer due to his counsel's strategic decision. Counsel testified at the post-conviction hearing that he was happy with the jury, and that he thought the trial had been going well to that point. Trial counsel was particularly pleased with the testimony of the State's primary witness, Neville Butler, which he felt had been helpful to his client, and trial counsel noted his concern that Butler's testimony would be more damaging at a retrial since the prosecution would be able to better prepare

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[40] On collateral review, the Florida Supreme Court found this specific allegation to be procedurally barred, as it had been raised and determined on the merits on direct appeal. *Maharaj IV*, 778 So. 2d at 950.

him.[41] Trial counsel also felt that the arrest of the judge might help his case by demonstrating the fallibility of the justice system. *Maharaj IV*, 778 So. 2d at 950-51. That court also noted that Petitioner did not testify at the postconviction hearing or otherwise present evidence to dispute that his counsel's decision was strategic. *Id.* This Court finds the Florida Supreme Court's factual findings reasonable and, because the decision to waive mistrial was based on a tactical decision made by counsel, that decision cannot satisfy the *Strickland* standard for deficient performance.[42] Petitioner is

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[41] Trial counsel also testified that he thought Prince Ellis's testimony was very helpful to the defense case and that, on a retrial, the State would likely not call him.

[42] Petitioner particularly objects to counsel's last justification, arguing that the second judge specifically precluded the parties from disclosing to the jurors the reason Judge Gross was unable to continue with the trial and told the jurors not to read anything about it in the papers. He argues that counsel could not have been effective if his strategic decision was based on a hope that the jurors would violate the trial court's order. However, the Supreme Court addressed a similar argument in its *Strickland* decision, stating that "the possibility of arbitrariness, whimsy, caprice, and 'nullification,'" though impermissible considerations in the prejudice inquiry, are "factors [that] may have entered into counsel's selection of strategies and, to that very limited extent, may thus affect the performance inquiry." *Strickland*, 466 U.S. at 695; *see also United States v. Agnes*, Civil No. 86-5367, 1987 WL 7398, at *9 (E.D. Pa. Mar. 3, 1987) ("Although the possibility of jury 'nullification' may not be considered by the court in determining whether counsel's errors prejudiced the defendant, this factor should be considered by the court in evaluating counsel's choice of trial strategy."), *aff'd*, 838 F.2d 459 (3d Cir. 1987). Thus, just as an attorney may consider the possibility of jury nullification even though he would not be permitted to argue for it, effective counsel may also, in making strategic trial decisions, consider the possibility that a jury will not follow a judge's instruction and will be persuaded by something outside the record. Moreover, the hope that the jury would consider Judge Gross's arrest was found to be only one factor which led to trial counsel's strategic decision. Interestingly, a colloquy of the jurors prior to resuming trial shows that, although the jurors had tried to avoid all information

not entitled to a new trial simply because a strategic decision by counsel did not result in acquittal.

Third, Petitioner argues that he is entitled to relief because Judge Gross attempted to bribe him in this particular case or because his counsel was ineffective in not moving for recusal before trial when his client informed him that the judge had attempted to bribe him. The Florida Supreme Court also addressed this claim, finding that Petitioner had failed to provide any evidence that Judge Gross had attempted to bribe him. That court found, rather, that the Petitioner had been approached by an assistant state's attorney three days before she was leaving the office to go into private practice. She reportedly told Petitioner she would be able to make sure he got out on bond due to her good relationship with Judge Gross if he would give her a $50,000 retainer. The court noted trial counsel's conclusion that the assistant state's attorney's offer was nothing more than her attempt to steal his client as she transitioned to private practice and that the offer was neither a bribery solicitation nor was it offered on behalf of Judge Gross.[43] The court further noted that no other witnesses were called and no other evidence was offered to demonstrate that it was a bribery attempt by the judge. The Florida Supreme Court held that any conclusion that it was such an attempt would be "sheer speculation based on the action of Judge Gross in another case." *Maharaj IV*, 778 So. 2d at 951-52. Petitioner objects, however, that he did offer other evidence, including counsel's statements regarding Judge Gross's hostility toward him during the trial. Yet, while counsel may have believed he was not treated as well as the government attorneys, he did not believe the judge's sub-

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about Judge Gross's arrest, about eight of them had inadvertently heard something about it.

[43] Trial counsel testified that "I interpreted that, if anything, as an attempt by counsel to persuade a client to hire that counsel and discharge the client's present counsel."

stantive rulings were biased or that any uncourteous treatment was related to the rejection of the assistant state's attorney's offer, and neither did the post-conviction trial court or the Florida Supreme Court after evaluating all of the evidence.[44] Although Petitioner further states that he was told that the offer was coming from the judge, the evidence presented to the state court only showed that the assistant state's attorney had claimed to have a good relationship with Judge Gross. The Florida Supreme Court noted that this statement was subject to a number of interpretations and does not demonstrate that she was soliciting a bribe on Judge Gross's behalf; "such a serious allegation must be demonstrated and cannot be left to surmise from differing interpretations." *Maharaj IV*, 778 So. 2d at 952. Thus, this Court not only finds that the Florida Supreme Court's conclusion was reasonable based on the evidence, but agrees that, even though Judge Gross's arrest does arouse some suspicion, Petitioner has failed to produce any evidence of a bribery solicitation by the judge in this case. This scant "evidence" of a bribery offer is wholly insufficient to establish Petitioner's claims and to overcome the presumption of correctness afforded to the state court findings.

Fourth, Petitioner argues that his counsel was ineffective for failing to link the assistant state's attorney's offer to Judge Gross and for not, thus, moving for recusal long before trial. Again, the Florida Supreme Court fully addressed this issue, finding that Judge Gross had never been linked to the bribery attempt even after further investigation, and there is thus no ground for finding that counsel was ineffective for failing to find such a link. Further, that court held that the assistant

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[44] Specifically, trial counsel stated that all he noticed was that it appeared to him that the judge was not concerned with "extending the general pleasantries that counsel are afforded or accorded during the course of litigation," denying that the change in demeanor extended to his rulings on "substantive matters."

state's attorney's statement regarding her influence with the judge was far from a clear indication that she was acting on behalf of the judge, and counsel cannot be faulted for failing, even after the judge's arrest, to interpret the offer as a bribery attempt by the judge. *See Maharaj IV*, 778 So.2d at 951-52. These are reasonable factual findings that this Court will not disturb.

Fifth and finally, the Petitioner argues that a 1997 Supreme Court case which granted discovery to determine if there was evidence that a judge who was convicted of corruption over ten years after a trial had been biased in that defendant's case should, at the very least, entitle him to discovery in this case. *See Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). However, that judge had presided over the entire trial, and the potential basis for his bias was not revealed until years later. The petitioner had never had an opportunity at trial to move for mistrial or otherwise bring up or investigate the issue of potential bias. Thus, in that case, the Supreme Court felt discovery was warranted to give the petitioner a first chance to address the question of judicial misconduct in his case. *Id.* Here, however, the judge was arrested mid-trial, the reason for his arrest was known to the Petitioner and his counsel, Petitioner and his counsel were aware of the perceived uncourteous treatment they allege they were subjected to, and Petitioner was given an adequate opportunity to consider and move for a mistrial. Petitioner specifically declined to do so because of counsel's strategic decision that the trial had been going better for him than a retrial potentially would. Allowing discovery as to Judge Gross's misconduct in this case, even were it to reveal any, would not change the fact that Petitioner waived his right to a mistrial and that counsel's decision was a strategic one made with sufficient knowledge of the alternatives. Thus, unlike in *Bracy*, discovery would not change the fact that counsel was not ineffective in advising his client to waive his right to a mistrial, nor would it alter the

validity of the waiver itself, and relief would therefore still not be warranted.

Petitioner's allegations of bias and misconduct by the other judges and the state investigators and prosecutors also do not state a ground for habeas relief. The Florida Supreme Court and post-conviction trial court did find that the sentencing judge had acted improperly in asking the State, *ex parte*, to prepare a sentencing order, *see Maharaj PCR Order* at 23-25, and found that Judge Glick should have recused himself before denying Petitioner's motion for a post-conviction evidentiary hearing. *See Maharaj III*, 684 So.2d at 728. However, these two errors were corrected through the orders requiring resentencing on the death penalty sentence and ordering a post-conviction hearing, both of which were subsequently conducted by different judges. This Court agrees with the Florida Supreme Court that "adequate relief has been granted to this defendant" on these two grounds. *See Maharaj IV*, 778 So.2d at 952. The Petitioner states that, nonetheless, Judge Solomon's *ex parte* conduct suggests he was biased throughout the guilt phase of the trial and that the possibility of such a bias requires a retrial. Nonetheless, the Petitioner did not provide any evidence of bias or cite specific instances of possible bias by Judge Solomon during the trial. Mere conjecture of this sort is insufficient to state a claim for federal habeas relief.

Finally, as to Petitioner's allegations of prosecutorial misconduct, most have been addressed in the context of the *Brady* or false testimony claims. Most of the remaining allegations claim that there was "prosecutorial misconduct" because the State did not adequately investigate certain leads or treated its witnesses too favorably by, for example, assisting Tino Geddes with gun charges brought against him in Puerto Rico and by not charging Butler for his alleged role in the murders. These instances of governmental conduct regarding the investigation and prosecution of the Petitioner

would not state a constitutional claim for relief, because, under our adversarial system, it is not within this Court's province to dictate how a state investigates and prosecutes its case, absent some illegality or specific violation of a defendant's constitutional rights, neither of which has been adequately alleged, much less demonstrated, here. His claim that the entire State's Attorney's Office should have been recused due to the "bribery" attempt by one departing assistant state's attorney is similarly rejected due to lack of evidence that this offer constituted improper State action or that anyone else from the State's Attorney's Office was involved in that offer.[45]

G. Newly Discovered Evidence Which Suggests Actual Innocence

Petitioner's third ground for relief states that all of the new evidence which has been developed since trial or which could be developed with proper funding suggests that Petitioner is actually innocent and compels this Court to grant him a new trial. Nonetheless, although Petitioner vigorously resists clear legal precedent, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (stating "[t]his rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."); *see also Sibley v. Culliver*, ___ F.3d ___, 2004 WL 1620831, at *8 (11th Cir. July 21, 2004) ("In practical terms,

[45] Petitioner's suggestion that, these determinations notwithstanding, the Court must at least grant funding for further investigation of all of his allegations of judicial and prosecutorial misconduct is rejected because this Court has no authority to provide funding or to order the State to provide resources, as discussed above.

this means that petitioner must show that 'a constituional violation has probably resulted in the conviction of one who is actually innocent. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'") (quoting *Shlup v. Delo*, 513 U.S. 298, 317 (1995)).[46] As the Court has found above, this new evidence did not arise as a result of a constitutional violation, and therefore cannot, in itself, support federal habeas relief. Moreover, most of the proposed new evidence would be offered merely to allow Petitioner to argue that other individuals, such as Adam Hosein or Neville Butler, may have committed the murders, that the victims' involvement with drug trafficking, money laundering, or financial fraud created a motive for others to commit the crimes, and that the victims' taking out of million dollar life insurance policies evidences their fear of being murdered due to their criminal activities. None of this evidence would establish by a preponderance of the evidence that no reasonable juror would have convicted Petitioner. *See Sibley*, 2004 WL 1620831, at *9 ("Sibley's actual innocence claim is hindered at the outset by a fatal shortcoming—he has not presented any actual evidence to the district court."). Moreover, the post-conviction trial court properly found that this evidence would not change the outcome of the trial since the evidence would be "inadmissible at trial because it relies primarily on hearsay and speculation" and "would not address the merits of the case, but merely attack the character of the victims." *Maharaj PCR Order* at 21.

Among the other claims of newly discovered evidence, Petitioner states that two of the State's witnesses, Prince Ellis

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[46] While Petitioner has cited several state cases that focus on actual innocence, the federal standard was clearly set out by the Supreme Court in *Herrera* and requires a showing of both newly discovered evidence of actual innocence *and* a constitutional violation.

and Neville Butler, have recanted their testimony at trial or, at the least, told inconsistent stories since the trial. An Eleventh Circuit interpretation of the Supreme Court's *Herrera* decision makes clear that recantation by a witness does not, in itself, state a ground for habeas relief. *See Brownlee v. Haley*, 306 F.3d 1043, 1065 ("It is not our role to make an independent determination of petitioner's guilt or innocence based on evidence that has emerged since the trial."). Although Petitioner has alleged that the State knowingly presented false testimony from Butler at trial, the Court has affirmed the Florida courts' findings that the State did not do so and did not violate the Petitioner's constitutional rights in this manner. Finally, Petitioner claims that he has discovered other individuals who can provide an alibi defense. As discussed above, the Court finds this claim is without merit because Petitioner knowingly, and probably wisely, waived his right to present an alibi defense at trial on his attorney's advice. Moreover, as noted above, counsel was not ineffective for failing to present such a defense, and Petitioner has thus failed to link any new alibi evidence to a constitutional violation.

H. Perjured Grand Jury Testimony

As his tenth ground for relief, Petitioner claims that the original grand jury indictment was based on perjured testimony. He admits that he has not reviewed the grand jury testimony and that the allegations of perjury are based on a review of the prosecutor's outline of evidence to be presented to the grand jury. However, even if the prosecutors' outline is an entirely accurate summary of the grand jury witnesses' testimony, the Court need not address whether the evidence is actually false or perjured since the error would be harmless. In a similar case involving allegations of improper testimony before a grand jury, the Supreme Court held that, even assuming a violation of federal procedural rules:

> The Rule protects against the danger that a defendant will be required to defend against a charge for which

> there is no probable cause to believe him guilty. The error . . . in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict means not only that they are in fact guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt. We cannot accept that a violation . . . requires automatic reversal of a subsequent conviction regardless of the lack of prejudice.

United States v. Mechanik, 475 U.S. 66, 70-71 (1986); *see also United States v. Jennings*, 991 F.2d 725, 728 (11th Cir. 1993). The Supreme Court distinguished its holding in *Vasquez v. Hillery*, 474 U.S. 254 (1986), regarding racial composition of the grand jury, stating "racial discrimination . . . is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future." *Mechanik*, 475 U.S. at 70 n. 1. Although the Eleventh Circuit has hinted at the possibility that "egregious prosecutorial misconduct might in some cases be governed by the Vasquez rule rather than the *Mechanik* rule," *Porter v. Wainwright*, 805 F.2d 930, 942 (11th Cir. 1986), in this case, any alleged prosecutorial misconduct in presenting false testimony before the grand jury would not be misconduct of such an egregious nature that the error would not be rendered harmless by a conviction. To the extent that false testimony was presented before the grand jury, there is no evidence that the prosecutor was aware of that fact at the time, and the question of whether inconsistencies in later testimony and statements would make the grand jury testimony discoverable has been addressed above. Accordingly, Petitioner has not

stated a claim that would entitle him to habeas relief with respect to errors in the grand jury process.

I. Consular Notification

Plaintiff's eleventh ground for relief is that the State of Florida did not comply with its obligation to Petitioner, a British citizen, under international law because the State never advised him of his right to notify his consulate as required by the Vienna Convention and the Bilateral Consular Convention between the United States and the United Kingdom. Petitioner claims that the outcome of the trial likely would have been different had he been advised of that right, stating that "Britain's intercession could have tipped the balance so as to ensure that the defense performed properly and that the prosecution acted fairly"and that, regardless, this failure of the State to advise Petitioner of his right to consular notification is a "structural error[] . . . so severe as to render a trial inherently unfair and, thus, should not be subject to harmless error analysis." The government of the United Kingdom has also filed an *amicus curiae* brief, raising these international comity issues regarding consular notification as a ground for habeas relief.

The Florida Supreme Court found that Petitioner's claim is barred from federal habeas review because the state habeas court denied this claim on procedural grounds. More specifically, as stated by the Florida Supreme Court, "this is an issue which could have and should have been raised on direct appeal. Since Maharaj did not timely pursue the issue, it is procedurally barred." *Maharaj IV*, 778 So. 2d at 959. The Florida Supreme Court is correct that the claim is procedurally barred. It is true that the violation of a treaty could state a ground for federal habeas relief since the United States Constitution makes treaties "the Supreme Law of the Land." However, under a fundamental federalism doctrine, the "adequate and independent state ground" doctrine, this Court cannot address a federal ground for relief if the state court

makes it clear that its decision is based on an adequate state ground that is unrelated to the federal ground for relief. The Supreme Court has specifically extended that doctrine to habeas cases, holding that "[t]he doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991). The rationale for this rule is that "the states should have the first opportunity to address and correct alleged violations of a state prisoner's federal rights." *Id.* at 731. However, in order for this doctrine to apply, the state court is required to provide "a clear and express statement of the default." *Id.* at 733. In this case, the Florida Supreme Court clearly and expressly grounded its denial of this claim on habeas review on the procedural default, and, as such, has stated an independent state ground for its decision.

Thus, unless the state ground was not adequate, this Court cannot review the state's denial based on the procedural default. Petitioner essentially argues that the denial of that ground was not "adequate," claiming that the State could not, and this Court may not, allow a procedural bar to prevent consideration of the merits of this claim. Petitioner claims that "controlling" authority from the International Court of Justice ("ICJ") compels this court to ignore the procedural default rule because this Court is "bound to recognize and respect any dispositive ruling made by the ICJ." Petitioner cites a recent ICJ opinion in which it found that, while the procedural default rule does not "[i]n itself . . . violate Article 36 of the Vienna Convention," it does violate that treaty provision when the rule "does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36 . . . that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the State from seeking and obtaining consular assis-

tance from the sending State." *LaGrand Case (Germany v. United States)*, 40 I.L.M. 1069, 1090 (ICJ 2001). The ICJ specifically noted that the procedural default rule prevented the United States' courts from basing their denials of this ground on anything other than the United States' constitutional standards for ineffective assistance of counsel. *Id.* Thus, it held that the "procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended" because it prevented the United States courts from "attaching any legal significance to the fact that the violation of the rights . . . prevented Germany, in a timely fashion, from retaining private counsel for [the LeGrands] and otherwise assisting in their defense." *Id.*

Subsequent to Petitioner's filing of his Objections, the ICJ issued another ruling on this issue, finding that the "procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment at ¶ 113 (Mar. 31, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm. The ICJ went on to state that:

> the rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Id. at ¶ 139. The ICJ "left to the United States the choice of means as to how review and reconsideration should be achieved, especially in light of the procedural default rule," but stated that it should occur "within the overall judicial proceedings relating to the individual defendant concerned" and that, while the executive clemency process can supplement the judicial review process, clemency procedures are insufficient, by themselves, to satisfy the review and reconsideration process envisioned by the ICJ. *Id.* at ¶¶ 141-143.

While the Court recognizes the importance of respecting international treaty obligations and does not wish to discount the opinions of the ICJ, long-standing jurisprudence makes clear that the United States Supreme Court is the final arbiter of all legal issues arising under the Constitution, including the interpretation and application of treaties and international law. For this reason, the Court is unable to give more than "respectful consideration" to those opinions, given that the Supreme Court has directly addressed whether state procedural default rules trump the Vienna Convention, and found that they do. *See Breard v. Greene*, 523 U.S. 371, 375 (1998). As the Supreme Court stated in that opinion, "while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, procedural rules of the forum state govern the implementation of the treaty in that state." *Id.* The Court further noted that, even though the Constitution makes treaties the supreme law of the land, "that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.* at 376. The Supreme Court thus concluded that treaty obligations are not immune from the procedural default rule and denied the petition for a writ of habeas corpus. *Id.* at 378-79. Although the Florida Supreme Court did not cite the *Breard* decision, its reliance on the procedural default rule, therefore, did not "result[] in a

decision that was contrary to, or involve[d] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d), and this Court cannot disturb the state court's application of that default under the deferential standard enacted by AEDPA. Despite the recent rulings of the ICJ, this Court, which is bound by the pronouncements of the United States Supreme Court, cannot simply ignore the *Breard* holding, which squarely addresses the issue here.[47]

Finally, Petitioner suggests that the state court should have considered whether Petitioner's counsel was ineffective and whether that ineffectiveness creates cause that justifies Petitioner's procedural default on this issue of the failure of consular notification. As a general rule, the Supreme Court has stated that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Court further held that, under the cause and prejudice standard for habeas relief, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's

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[47] Petitioner has also filed supplemental authority from an Oklahoma Court of Criminal Appeals case in which the State stayed execution of a Mexican national in order to hold an evidentiary hearing on whether violation of his right to consular notification prejudiced him, in accordance with the ICJ opinion in *Avena*. *See Torres v. Oklahoma*, No. PCD 04-442, Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing (Okla. Crim. App. May 13, 2004). While it is noteworthy that at least one state court is taking such action despite its own procedural default rules, this Court is not similarly empowered to ignore a state default rule. Thus, this recent decision in no way affects this Court's inability to either force the State of Florida to comply with the ICJ ruling or to independently review the merits despite the default.

efforts to comply with the State's procedural rule." *Id.* at 492. Thus, "attorney error that constitutes ineffective assistance of counsel is cause" because, under those circumstances, the attorney error becomes imputed to the State, but "attorney ignorance or inadvertence is not 'cause.'" *Coleman*, 501 U.S. at 753-54. In this case, if Petitioner can demonstrate that his appellate counsel was constitutionally ineffective in not raising this international claim on direct appeal, then the substantive claim could be reviewed despite the procedural default.

Nonetheless, Petitioner has failed to demonstrate counsel was ineffective in this regard. First, while Petitioner generally argues that the Florida courts "never, apparently, even considered his claim that his counsel's ineffectiveness should be considered cause excusing this default," he does not provide any facts to further support how appellate counsel could have met the test of ineffectiveness enunciated in *Strickland* and *Evitts v. Lucy*, 469 U.S. 387 (1985). In fact, his argument that his appellate counsel was ineffective centers on the firm's failure to represent him in the hearing that was to be conducted pursuant to his writ of error *coram nobis* and for its failure to raise the issue of the prosecutor's courtroom behavior in his appeal. As the Eleventh Circuit has stated, "the best way to evaluate" an appellate counsel ineffectiveness claim "is to examine the alleged trial errors to see if they contain sufficient merit . . . that appellate counsel can be faulted for not having raised them." *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). However, the Supreme Court has noted that appellate counsel need not raise every colorable claim on appeal in order to be deemed effective, particularly when page limitations and limited time for oral argument requires a good advocate to choose the strongest claims to avoid the "risk of burying good arguments —those that, in the words of the great advocate John W. Davis, 'go for the jugular.'" *Jones v. Barnes*, 463 U.S. 745, 753 (1983). Appellate counsel's failure to raise this claim on appeal is certainly understandable, given that, as discussed below,

many courts have found that petitioners do not even have individual standing to claim that their rights under the Vienna Convention were violated, and even fewer have granted substantive relief on those grounds. In fact, on his habeas petition, the Florida Supreme Court did substantively find that Petitioner did not have standing to assert a violation of his rights under the Vienna Convention because "treaties are between countries, not citizens." For this same reason, Petitioner has failed to show that, even if appellate counsel's failure did constitute ineffectiveness, the Florida courts would likely have granted him relief on that ground, and thus there is no prejudice. *See, e.g., Polanco v. United States*, 2000 WL 1072303, at *7 (S.D.N.Y. Aug. 3, 2000) (denying relief and citing several other cases that similarly found that the defendant had not "made a plausible showing that the alleged failure to inform him of his right to contact his consulate impacted the outcome of his trial").[48]

However, despite the fact that Supreme Court precedent prevents this Court from granting a writ of habeas corpus in this case, this Court finds, for the following reasons, that the Petitioner has raised a constitutional issue for which a certificate of appealability should issue. First, the Supreme Court did not have the advantage of the ICJ's rulings and analysis of the Vienna Convention when it decided *Breard v.*

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[48] There is some disagreement among courts as to whether a defendant or habeas petitioner has standing to raise the lack of consular notification, although there does not appear to be any Eleventh Circuit case law on this issue. The Iowa Supreme Court has provided a helpful synopsis of the split of authority on this issue, stating that "[c]ourts that have addressed the issue of consular notification are split on whether Article 36 actually creates an individual enforceable right," followed by summaries of the holdings of various courts that have addressed the question. *See Ledezma v. State*, 626 N.W.2d 134, 151 (Iowa 2001); *see also United States v. Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000). However, the Court need not decide that issue here, since it has determined that the whole question of consular notification is not reviewable by this Court.

Greene in 1998. *See Breard*, 523 U.S. at 378 (noting that "[i]t is unfortunate that this matter comes before us while proceedings are pending before the ICJ"). Second, the opinion was rendered on incomplete briefing and abbreviated deliberation due to the pending execution of that petitioner, which the Commonwealth of Virginia had refused to delay. Third, three justices dissented from the *Breard* opinion, stating they would have granted a stay of execution in order to allow for more full consideration of the international issues raised in the petition. In fact, one district court has recently found that the ICJ's *LeGrand* opinion undermines the major premise of the *Breard* holding and that the precedential value of Breard was limited to begin with because it was a *per curiam* opinion that was decided on an expedited basis. *See United States ex rel. Madaj v. Schomig*, 223 F. Supp. 2d 968, 977-80 (N.D. Ill. 2002). That Court, therefore, granted some relief based on the violation of the Vienna Convention. *Id.* at 980. Although this Court does not agree that Supreme Court precedent can so easily be ignored, the changes in circumstances since the Supreme Court issues its *Breard* decision in 1998 do give rise to a colorable constitutional claim which creates an appealable issue.

J. Accumulation of Errors

As his second ground for habeas relief, Petitioner claims that all of the trial errors he alleges in his Petition, even if insufficient independently to state a claim for relief, must be looked to for their aggregate effect. In order for the cumulative effect of the errors to state a ground for federal relief, the Petitioner must demonstrate that, due to the errors, "the state trial was so 'fundamentally unfair' as to amount to a denial of due process." *See Bronstein v. Wainwright*, 646 F.2d 1048, 1056 (5th Cir. Unit B 1981) (noting that "an error in a state trial does not rise to the level of a Fourteenth Amendment violation unless the alleged error so infects the entire trial that the resulting conviction violated due proc-

ess"); *see also Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) (noting that, for cumulative errors in a state trial to state a ground for relief, the federal court must also find "the individual errors involved matters of constitutional dimension rather than mere violations of state law" and that "the errors were not procedurally defaulted for habeas purposes"). As set out above, the Court has found no single error that rises to the level of a constitutional violation, and does not find that the cumulative effect of any non-constitutional errors "so infected the entire trial that the resulting conviction violates due process." *See Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

Conclusion

For the reasons stated above, it is

ORDERED AND ADJUDGED that Petitioner's Petition for habeas relief under 28 U.S.C. § 2254 is DENIED. All pending Motions are DENIED as moot, and the Clerk is directed to CLOSE this case.[49]

DONE AND ORDERED in Miami, Florida, on this 30th day of August, 2004.

/s/ Paul C. Huck
PAUL C. HUCK
United States District Judge

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[49] A petitioner may not appeal a final order in a habeas corpus proceeding unless a circuit justice or district judge issues a certificate of appealability, and a certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Federal Rules of Appellate Procedure and Local Appellate Rules specify that a certificate of appealability or denial of such shall be issued only after a notice of appeal is filed. However, due to Petitioner's tendency to file lengthy motions in this matter and because the Court has already thoroughly evaluated all claims that could be argued in a request for a certificate of appealability, the Court has included in this Order an explanation of the claims for which it will issue a certificate of appealability if this decision is appealed.